TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 37

SIOUX REMEDY COMPANY, PLAINTIFF IN ERROR,

vs.

F. M. COPE AND D. C. COPE.

IN ERROR TO THE CIRCUIT COURT OF TURNER COUNTY, STATE OF SOUTH DAKOTA.

FILED JUNE 22, 1912.

(23,267)

(23,267)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 692.

SIOUX REMEDY COMPANY, PLAINTIFF IN ERROR,

vs.

F. M. COPE AND D. C. COPE.

IN ERROR TO THE CIRCUIT COURT OF TURNER COUNTY, STATE OF SOUTH DAKOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1912.

1 STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court.

SIOUX REMEDY COMPANY, Plaintiff and Plaintiff in Error,
vs.
F. M. COPE and D. C. COPE, Defendants and Defendants in Error.

Return to United States Supreme Court.

To the Honorable the Supreme Court of the United States:

In obedience to the command of the writ of error issued from your Court, and in accordance with the præcipe designating the parts of such record as are to be returned, I do hereby certify that the annexed præcipe, citation, writ of error, bond and assignment of errors and prayer for reversal are each and all the original papers served on appeal in the above entitled action; and that the annexed complaint, answer, bill of exceptions, stipulation as to foreign corporation, verdict, judgment of circuit court, judgment of Supreme Court, and opinion rendered by Supreme Court are each full, true and complete copies of such original papers now on file in my office in this action.

Witness my hand and the seal of said court at Parker this 14th day of June, 1912.

[Seal of the Circuit Court, Turner County, South Dakota.]

DAN E. HANSON,
Clerk of Circuit Court.

2 UNITED STATES OF AMERICA:

In Supreme Court.

SIOUX REMEDY COMPANY, Plaintiff in Error,
vs.
F. M. COPE and D. C. COPE, Defendants in Error.

Præcipe for Record to Be Returned to Supreme Court.

To the Clerk of the Circuit Court of Turner County, South Dakota:

In accordance with the Writ of Error which has been issued and lodged in your office in this action, you are hereby required to forward to the Clerk of the Supreme Court of the United States at Washington, D. C., in return with said Writ and this Præcipe, the following parts of the record, only:

Complaint.
Answer.
Bill of Exceptions.
Stipulation as to foreign Corporation.
Verdict.
Judgment of Circuit Court.
Judgment of Supreme Court.
Opinion Rendered by Supreme Court.
Assignment of Errors, and
Prayer for Reversal.
Citation.
Undertaking or Bond.

JOE KIRBY,
Att'y for Pl'ff in Error.

3 [Endorsed:] United States of America, in Supreme Court. Præcipe for record to be returned to Supreme Court. Sioux Remedy Co. vs. Cope. Due, timely, and personal service admitted on the within this 27 day of May, 1912. Bogue & Bogue, Def'd'ts' Attorneys. Filed May 29, 1912. Dan E. Hanson, Clerk.

4 UNITED STATES OF AMERICA:

In Supreme Court.

SIOUX REMEDY COMPANY, Plaintiff in Error,
vs.
F. M. COPE and D. C. COPE, Defendants in Error.

Citation.

The President of the United States of America to F. M. Cope and D. C. Cope and Messrs. Bogue & Bogue, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C. within sixty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the Circuit Court of Turner County, South Dakota, in the above entitled action, being an action wherein judgment was rendered in favor of the said F. M. Cope and D. C. Cope, and against the Sioux Remedy Company, appeal from which final judgment was taken to the Supreme Court of the State of South Dakota and the decision of the trial court affirmed and the record and proceedings have been returned and are now in said Circuit Court, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Done at the city of Pierre in the State of South Dakota this 15th day of May, 1912.

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

[Endorsed:] United States of America. In Supreme Court. Sioux Remedy Company, Plaintiff in Error, vs. F. M. Cope and D. C. Cope, Defendants in Error. Citation. Due, timely, and personal service admitted on the within this 27 day of May, 1912. Bogue & Bogue, Def'd'ts' Attorney. Filed May 29, 1912. Dan E. Hanson, Clerk.

5 UNITED STATES OF AMERICA:

In Supreme Court.

SIOUX REMEDY COMPANY, Plaintiff in Error,
vs.
F. M. COPE and D. C. COPE, Defendants in Error.

Writ of Error.

The President of the United States to the Honorable the Circuit Judge of Turner County, South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the final judgment, of a plea which is in said Circuit Court of Turner County, South Dakota, before you in an action wherein Sioux Remedy Company is plaintiff and F. M. Cope and D. C. Cope are defendants, appeal from which said final judgment was taken by the said Sioux Remedy Company to the Supreme Court of the state of South Dakota, and by which latter court the judgment rendered in your court was in all things affirmed and made final, and the record and proceedings having been returned from said Supreme Court to your court for execution of said judgment wherein was drawn in question an authority exercised under the United States, and the decision is against its validity, and also there is drawn in question the validity of a statute of and the authority exercised under the laws of the state of South Dakota on the ground of their being re-
6 pugnant to the constitution and the laws of the United States, and the decision and judgment is in favor of their validity, and the said Sioux Remedy Company claim rights, privileges and immunities under the constitution of the United States, and the decision is against such rights, privileges and immunities so claimed by it under said constitution; a manifest error hath happened to the great damage of the said Sioux Remedy Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done in the premises aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington within sixty days from the date hereof in said Supreme Court to be then and there held that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court this 11th day of May, 1912.

[Seal District Court, District of South Dakota.]

OLIVER S. PINDAR,
Clerk of District Court of the United States
for the District of South Dakota.
By ODIN R. DAVIS, *Deputy.*

Allowed by—
J. H. McCOY,
Presiding Judge of the Supreme Court
of the State of South Dakota.

7 [Endorsed:] United States of America, In Supreme Court. Sioux Remedy Company, Plaintiff in Error, vs. F. M. Cope and D. C. Cope, Defendants in Error. Writ of Error. Filed May 25, 1912. Dan E. Hanson, Clerk.

8 UNITED STATES OF AMERICA:

In Supreme Court.

SIOUX REMEDY COMPANY, Plaintiff in Error,
vs.
F. M. COPE and D. C. COPE, Defendants in Error.

Bond.

Whereas, in the above entitled action the plaintiff in error has procured a writ of error from the Supreme Court of the United States to the Circuit Court of Turner County, South Dakota, for the purpose of, among other things, reviewing the final judgment entered therein:

Now therefore, it is hereby agreed by the undersigned on the part of the said Sioux Remedy Company that it, the said Sioux Remedy Company, shall prosecute said writ of error to effect, and if it fail to make good its plea, shall answer all costs, provided our liability thereunder shall not exceed the sum of Two hundred fifty ($250.00) Dollars.

SIOUX REMEDY COMPANY,
By JOE KIRBY, *Its Attorney.*
S. L. STUBBS.
R. F. LYONS.

I hereby approve of the foregoing bond

J. H. McCOY
Presiding Judge Supreme Court, South Dakota.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

We, the undersigned, being first severally sworn, do on oath depose and say that we are residents, citizens and freeholders of the

state of South Dakota, and worth the sum of Two hundred fifty ($250.00) Dollars, over and above all our debts, liabilities and property exempt from execution.

S. L. STUBBS.
R. F. LYONS.

Subscribed and sworn to before me this 14th day of May, 1912.

[Seal of John D. Lynch, Notary Public, South Dakota.]

JOHN D. LYNCH,
Notary Public, South Dakota.

9 [Endorsed:] United States of America. In Supreme Court. Sioux Remedy Company, Plaintiff in Error, vs. F. M. Cope and D. C. Cope, Defendants in Error. Bond. Filed May 25, 1912. Dan E. Hanson, Clerk.

10 STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court.

SIOUX REMEDY COMPANY, Plaintiff,
vs.
F. M. and D. C. COPE, Defendants.

Assignment of Errors.

Now comes the plaintiff in the above entitled action and respectfully shows that the said Circuit Court erred as follows:

1. In deciding that this plaintiff could not maintain an action in the state of South Dakota to recover the value of merchandise sold to the defendants at Algona, Iowa, and delivered to a common carrier for delivery to said defendant at Centerville, South Dakota, without having complied with sections 883 and 885 of the Civil Code of the state of South Dakota.

2. That so far as said sections 883 and 885 of said Civil Code prohibit this plaintiff from maintaining an action in the courts of the state of South Dakota, based on the sales of merchandise made in a foreign state from South Dakota, it is in conflict with the Constitution of the United States and the Acts of Congress, and is an undue interference by said state with interstate commerce, and by depriving this plaintiff of its right to maintain such action, deprives it of its property without due process of law.

11 3. That the trial court erred in rendering its judgment in favor of said defendants and against the said Sioux Remedy Company.

4. That the Supreme Court of the state of South Dakota erred in sustaining said judgment of said trial court.

5. That this plaintiff, the Sioux Remedy Company, claims under the Constitution of the United States and the laws of Congress the right to maintain said action in the courts of the state of South

Dakota and have the same adjudicated in the same manner and way on its merits as would take place between the citizens of the state of South Dakota, and further claims that the action of said court is to deprive this plaintiff of the right to carry on interstate commerce, and confiscate its property by depriving it of the privilege of enforcing its rights without due process of law.

Prayer for Reversal.

Wherefore this plaintiff prays that upon writ of error being issued by the Supreme Court of the United States that the records and proceedings be forwarded to said Court and that the action of said Circuit Court, as well as that of the Supreme Court of South Dakota be reversed and said Court be directed to proceed with said action in accordance with law and the decision of said Supreme Court.

Respectfully submitted.

JOE KIRBY,
Attorney for Sioux Remedy Co.

Sioux Falls, South Dakota, May 7, 1912.

12 [Endorsed:] United States of America, In Supreme Court. Sioux Remedy Company, Plaintiff in Error, vs. F. M. Cope and D. C. Cope, Defendants in Error. Assignment of Errors. Filed May 25, 1912. Dan E. Hanson, Clerk.

13 Be it known, that on the 14th day of September, 1910 there was filed in this action a

Complaint,

of which the following is a copy, to-wit:

STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court.

SIOUX REMEDY COMPANY, Plaintiff,
vs.
F. M. COPE and D. C. COPE, Defendants.

Plaintiff complains and for cause of action states:

I. That this plaintiff is and was at all the times in this complaint mentioned, a corporation duly organized and existing according to law.

II. That on or about the 16th day of July, 1909 this plaintiff sold and delivered to the said defendants, goods, wares, and merchandise of the true and agreed value of Eighty (80.00) Dollars, no part of which has been paid.

Wherefore, Plaintiff demands judgment against the said defendants for said sum of eighty ($80.00) dollars, together with costs and disbursements of this action.

JOE KIRBY,
Attorney for Plaintiff.

(Endorsed: Due, timely and personal service of the within complaint admitted this 6th day of November, 1909. Bogue & Bogue, Defendants' Attorneys. Filed September 14, 1910. Dan E. Hanson, Clerk.)

On February 14, 1911 there was filed in this action an

Answer,

of which the following is a copy, to-wit:

STATE OF SOUTH DAKOTA,
County of Turner, ss.

In Circuit Court, First Judicial Circuit.

14 SIOUX REMEDY COMPANY, Plaintiff,
vs.
F. M. COPE and D. C. COPE, Defendants.

The above named defendant, F. M. Cope, for answer to the complaint of plaintiff herein alleges:

1.

Denies each and every allegation, matter and thing in plaintiff's complaint contained not herein expressly admitted.

2.

That the plaintiff is a foreign corporation, not organized or existing by virtue of the laws of the state of South Dakota.

3.

That the plaintiff, corporation, has not complied with sections 883 and 885 of the revised civil code of the State of South Dakota, relative to foreign corporations doing business within this state, in that the plaintiff has not filed in the office of the secretary of state of this state a duly authenticated copy of its charter or articles of incorporation, nor has said plaintiff appointed an agent residing at some accessible point in this state, duly authorized to accept service of process and upon whom such service of process may be had in any action in which said corporation may be a party, and has not filed and recorded in the office of the secretary of state, and register of deeds of the county where such agent resides, a duly authenticated copy of the appointment of said agent, as defendant is informed and believes; and that on that account this action cannot

be maintained in any of the courts of this state, and the same should be dismissed and abated.

4.

That on or about the 16th day of July, 1909, the said F. M. Cope signed a written order or contract on behalf of Cope Brothers, which is as follows:

Duplicate Agreement.

Made and entered into 26th day of July, 1909, by and between Sioux Remedy Company, of Algona, Iowa, party of the first part, and Cope Bros. of Centerville, County of Turner, state of S. Dak. second party: Witnesseth: That party of the first part agrees to ship unto second party, as soon as convenient, the goods hereafter set out; and to refill this order as often as the company sees fit to do so, unless this agreement is canceled by mutual consent of both parties. Said second party agrees to receive said goods, and to sell the same at and for the retail price as follows: Stock food, wholesale price, $1.75 per sack, retail price per sack $3.00; calf food meal, wholesale price, per sack, 85¢, retail price per sack, $1.25; healing salve, wholesale price 15¢, retail price 25¢; worm remedy, wholesale price, $1.00, retail price $1.50; barbed wire liniment, wholesale price 60¢, retail price, $1.00; hoof ointment, wholesale price 30¢, retail price 50¢; louse killer, wholesale price 75¢, retail price $1.00; harness dressing, wholesale price 30¢, retail price 50¢; spavin remedy, wholesale price 75¢, retail price $1.00; gall remedy, wholesale price 15¢, retail price, 25¢; heave remedy, wholesale price, 75¢; retail price $1.00; poultry powder, wholesale price 50¢, retail price 75¢; colic remedy, wholesale price, 60¢, retail price $1.00; calf dehorner, wholesale price 75¢, retail price, $1.00; lump jaw remedy, retail price, 75¢, wholesale price, $1.00; poll evil remedy, wholesale price 75¢, retail price $1.00. Said second party agrees to pay to first party on demand, the wholesale price as given above, of each article or package to be shipped, said goods to be consigned to second party at his address as above, unless otherwise directed hereon.

Positive Guarantee.

The Sioux Remedy Company guarantees each and every article sold by it to fulfil the recommendations made as printed on such article, and agrees that as damages for failure of an article to fulfill such recommendation in every respect, when used according to directions, it will refund to the consumer such sums as he shall have paid the company therefor, on such articles complained of.

Goods to be Shipped—1 doz. pkgs. worm exterminator, 6 pkgs. of louse killer, 1 doz. heave remedy pkgs., 1 doz. capsules poll evil remedy, 1 doz. pkgs. calf dehorner, 1 doz. lump jaw remedies, 1 doz. spavin remedy, 1 doz. barbed wire liniment, 1 doz. colic remedy. The foregoing goods to be delivered f. o. b. cars at any distributing point.

And the first party does hereby also give the second party the right to sell the Sioux City Remedy Co.'s remedies. Not subject to countermand by second party, and said second party further agrees to keep on hand and distribute such advertising material as may be furnished by the party of the first part, free to the second party; and should second party fail to fulfill any of the above agreements, and fail to sell the goods, then the Sioux Remedy Co. or their authorized employés will have the right to take the cabinet back and cancel this contract. The agent who makes this agreement for the company is a special agent for that purpose. The above is the whole contract between the parties.

SIOUX REMEDY CO.
COPE BROS.

Shipping place, Centerville, S. Dak.'

5.

That the said instrument was procured by the plaintiff from the defendant, F. M. Cope, by fraud and misrepresentation, in this, that the plaintiff by and through its duly authorized agent represented to the said F. M. Cope that plaintiff was introducing
16 the remedies referred to in the said contract and that plaintiff desired to place the cabinet referred to in said contract into the store of defendants, containing 1 doz. pkgs. worm exterminator, 6 pkgs. of louse killer, 1 doz. heave remedy pkgs. 1 doz. capsules poll evil remedy, 1 doz. pkgs. calf dehorner, 1 doz. lump jaw remedies, 1 doz. spavin remedy, 1 doz. barbed wire linament, and 1 doz. colic remedy, and that the defendants could sell such of said remedies as their trade afforded and that during each year the plaintiff would send an agent around to check up the sales made during the year, and would allow the defendants forty per cent of the selling price as their commissions for selling the goods; that the remedies were good remedies and meritorious and would sell well and give good satisfaction; that if the said remedies fail to sell or that the defendants cannot sell same, then the plaintiff would take the said cabinet and remedies back and cancel the contract without any expense to defendants, and pointed out the latter part of the contract and said you see I am telling you the truth, and the only reason the plaintiff wants your signature to this little agreement is to show that you are willing to allow the said goods to be placed in your store and that you will undertake to sell the same and plaintiff will know who to ship the same to; that the defendant, F. M. Cope, then and there relied upon said false and fraudulent representations so made and believed them to be true, and so relying and believing was thereby induced to execute and deliver the said instrument, and not otherwise. That in truth and in fact the representations so made by said plaintiff were false and fraudulent, as the said agent of the plaintiff then and there well knew; and that he made the same for the express purpose of defrauding the defendants and procuring the signature of the said Cope to the said contract; that in truth and in fact the plaintiff was not intro-

ducing its remedies referred to in the said contract, and did not intend to place the said cabinet in the store of the defendants to have them sell such of said remedies as their trade demanded or would afford, and send a man around during the year to check up the goods sold and allow the defendants forty per cent of the selling price as commissions, but was in fact selling or attempting to sell the said remedies to the defendants outright, that is, the remedies contained in the said cabinet, and the purpose of placing the said cabinet with the said remedies in the store of defendants was to fool them as to the true purpose of the plaintiff; that the plaintiff did not intend to send a man around during the year and check up the amount of goods sold and allow the defendants 40 per cent of the selling price as commissions for selling the same, but was attempting to affect a completed sale by trickery and deceit; that the said goods were without merit and would not sell on the market or give satisfaction to the trade of the defendants or to any one and were worthless; that plaintiff did not intend to remove the said cabinet and remedies from the store of defendants and cancel the said contract if they could not sell the said goods, without expense to defendants; that plaintiff's agent pointed out the latter
17 part of said contract, viz. the part which reads as follows: "and should second party fail to fulfill any of the above agreements, and fail to sell the goods, then the Sioux Remedy Co. or their authorized employees will have the right to take the cabinet back and cancel this contract" for the express purpose of deceiving the said defendant, F. M. Cope, and diverting his attention from other provisions of the said contract; that plaintiff was then and there attempting to artfully foist upon the defendants a lot of worthless remedies; that all of said representations were false and known to be false by the said agent of the plaintiff, duly authorized, at the time he procured the signature of F. M. Cope to the said contract, and were all made for the express purpose of procuring the signature of the said Cope to the said contract.

6.

That during the month of August, 1909, the plaintiff shipped to defendants the said cabinets and the said remedies therein contained described above, and the defendants placed the same in their store at Centerville, South Dakota, and attempted in good faith to sell the said remedies at the prices fixed in the said contract, for the plaintiff as above stated, and did not discover the falsity of the said representations so made to them by the plaintiff, through the said agent, until on or about the 16th day of September, 1909, on which date they tendered back to the plaintiff the said cabinet and remedies and demanded that the said agreement be cancelled, but plaintiff refused to receive the same or cancel the said contract; that thereafter and on or about the 16th day of November, 1909, the defendants again notified the plaintiff that they rescinded the said contract on the ground that the same was procured by fraud and misrepresentation on the part of the plaintiff, and offered to restore to the plaintiff all of said goods, except one bottle of lice

killer, which defendants sold, and one bottle of heave remedy which defendants used, and the defendants tendered to the plaintiff the sum of $1.50 in money for the said remedies so sold and used by them, and notified the plaintiff that the said cabinet and goods were held by them subject to their order, and offered to ship them to the plaintiff at Algona, Iowa, or any other place that the plaintiff might designate, and offered to remit them the said $1.50; that the said goods are still in the possession of the defendants, and they now bring and hereby tender into court the said cabinet and goods and the said $1.50 for the said plaintiff, and is now ready and willing and has at all times since they discovered the said fraud been ready and willing to deliver the same to the plaintiff and to pay to the plaintiff the said $1.50 in money, as the court may direct.

Wherefore, the defendant, F. M. Cope, demands judgment dismissing the complaint of the plaintiff herein, and that the said contract be adjudged void and be delivered up and cancelled, and for such other and further relief as may be just, and for the costs of this action.

BOGUE & BOGUE.
Attorneys for Defendant F. M. Cope.

18 (Endorsed: Due, and personal service of the within answer admitted and accepted at Sioux Falls, South Dakota this 3rd day of December, 1909 by copy. Joe Kirby—Attorney for Plaintiff. Filed Feb. 14, 1911. Dan E. Hanson, Clerk.)

On February 20, 1911 there was filed in this action a

Bill of Exceptions,

of which the following is a copy, to-wit:—

"In Circuit Court of Turner County, S. D.

SIOUX REMEDY COMPANY, Plaintiff,
vs.
F. M. COPE & D. C. COPE, Defendants.

Bill of Exceptions.

This action came on for trial before the Court and a jury on the 14th day of February, when the following proceedings were had:

F. M. COPE, called by plaintiff for cross examination, under the statutes testified:

"Myself and D. C. Cope constitute the firm of Cope Bros. I signed for said firm Exhibit "A". The goods therein were shortly after received by said firm by express from, I suppose, Algona, Iowa. Exhibit "A" was signed at Centerville, S. D. and delivered to plaintiff's agent there."

Plaintiff offers and there is received in evidence said Exhibit "A", a true copy of which is set forth in the defendants' answer. Plaintiff rests.

Thereupon the parties filed with the clerk in this action, and presented to the court, a stipulation in writing showing the plaintiff to be a foreign corporation and that it had not complied with the laws of this state, which stipulation is on file and made a part hereof.

Thereupon the defendants moved the court to direct a verdict for the defendants for the reasons as shown by said stipulation, which motion was granted and verdict rendered and entered as is now on file with the clerk. To which direction of verdict plaintiff duly excepts and said exception is settled.

We hereby agree the foregoing is correct and may be settled without further notice.

JOE KIRBY, *Ptff. Atty.*
BOGUE & BOGUE,
Defts' Atty.

19 TURNER COUNTY:

I, the judge before whom said action was tried, do hereby certify the within bill of exceptions, all written on this sheet, is just and correct and that the exceptions therein mentioned were taken and allowed as therein contained and the same is hereby settled and ordered filed as a part of the judgment roll in this action.

I further certify the said bill contains all the evidence introduced on said trial.

R. B. TRIPP, *Judge.*"

February 16th, 1911.

(Endorsed: Feb. 20, 1911. Dan E. Hanson, Clerk.)

On February 14, 1911 there was filed in this action a

Stipulation,

of which the following is a copy, to-wit:

STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court, First Judicial Circuit.

THE SIOUX REMEDY COMPANY, Plaintiff,
vs.
F. M. COPE and D. C. COPE, Defendants.

Stipulation as to Foreign Corporation.

It is hereby stipulated by and between Joe Kirby, the attorney of record for the plaintiff herein, and Bogue & Bogue, attorneys of record for the defendants herein, that the above named plaintiff

is a foreign corporation; that it has not filed in the office of the secretary of state of South Dakota, a duly authenticated copy of its charter of articles of incorporation; that it has not appointed an agent residing within this state at some accessible point in this state, duly authorized to accept service of process and upon whom such service of process may be had in any action in which said corporation may be a party; and that plaintiff has not filed a duly authenticated copy of the appointment of an agent in this state and recorded the same in the office of the secretary of state and register of deeds of the county where such agent resides.

Dated this 7th day of February A. D. 1911.

JOE KIRBY,
Attorney for Plaintiff.
BOGUE & BOGUE,
Attorneys for Defendants.

20 On February 15, 1911 there was filed in this action the following

Verdict.

STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court, First Judicial Circuit.

SIOUX REMEDY COMPANY, a Corporation, Plaintiff,
vs.
F. M. COPE and D. C. COPE, Defendants.

We, the jury, by the direction of the court, do find for the defendants upon all of the issues pertaining to the defense set up in the first three paragraphs of defendants' answer in reference to the right of the plaintiff to maintain this action.

Parker, S. D. Feb. 15, 1911.

F. W. BONNIE, *Foreman.*

(Endorsed: Filed Feb. 15, 1911. C-244. Dan E. Hanson, Clerk.)

On March 1, 1911 there was duly rendered by the Court, filed in this office and entered of record in this action, the following

Judgment.

STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court, First Judicial Circuit.

SIOUX REMEDY COMPANY, Plaintiff,
vs.
F. M. COPE and D. C. COPE, Defendants.

The above entitled action coming on for trial in its regular order upon the calendar of the regular A. D. 1911 February term of
21 said court, at the court house in the city of Parker, in said county and state, on the 14th day of February, 1911; Joe Kirby appearing as the attorney for the plaintiff, and Bogue & Bogue, appearing as the attorneys for the defendants. A jury was duly and legally empaneled to try the issues of fact therein, and after the plaintiff rested and certain evidence was offered on the part of defendants showing that the plaintiff was a foreign corporation and that it had not complied with the laws of this state relative to such corporations doing business within this state, or suing and maintaining actions in the courts of this state, the court upon the motion of defendants' attorneys, directed a verdict in favor of the defendants and against the plaintiff on the ground that the plaintiff had failed to comply with the provisions of sections 883, and 885, of the Revised Civil Code of this State relative to foreign corporations doing business and maintaining actions within this state. It is Therefore

Ordered, Adjudged and Decreed That the defendants herein have judgment against the plaintiff herein, dismissing plaintiff's complaint and cause of action, and for the costs of this action, taxed by the clerk of the circuit court at the sum of $25.53, and that judgment be and is hereby entered accordingly.

Dated this 23rd day of February A. D. 1911.

By the Court,

R. B. TRIPP, *Judge.*

Attest:

DAN E. HANSON,
Clerk of the Circuit Court.

(Endorsed: 3053—Due and personal service of the within and foregoing judgment is hereby admitted and accepted at Parker, Turner County, South Dakota, by true copy, this 28 day of February, A. D. 1911. Joe Kirby, Attorney for Plaintiff. Filed March 1, 1911. E.—87. Dan E. Hanson. Judgment Roll filed March 6, 1911, Dan E. Hanson, Clerk. Supreme Court, State of South Dakota. Filed March 8, 1911, Frank Crane, Clerk.)

On January 16, 1912 there was filed in this office a

Transcript of the Judgment

of the Supreme Court of the State of South Dakota, rendered in this action, of which the following is a copy—

In the Supreme Court, State of South Dakota, October Term, A. D. 1911.

File No. 3053.

22 Present: Ellison G. Smith, Presiding Judge, Dighton Corson, Dick Haney, Chas. S. Whiting and J. H. McCoy, Judges of said Court, and the officers thereof.

SIOUX REMEDY COMPANY, Plaintiff and Appellant,
vs.
F. M. COPE and D. C. COPE, Defendants and Respondents.

This action coming on to be heard at the October A. D. 1911, Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and without oral argument; and the Court having advised thereon and filed its decision in writing.

It is Considered, Ordered and Adjudged, That the judgment of the Circuit Court within and for Turner County, appealed from herein, be and the same is hereby affirmed.

And It Is Further Ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And It Is Further Ordered and Adjudged, That respondents have and recover of the appellant, costs and disbursements on this appeal, expended, taxed and allowed at Forty-seven and no/100 Dollars.

McCoy, J. concurring specially.
Corson, J. dissenting.

By the Court:
[SEAL.] ELLISON G. SMITH,
Presiding Judge.

Attest:
FRANK CRANE, *Clerk,*
By —— ——, *Deputy.*

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, Frank Crane, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the Judgment of the Supreme Court of the State of South Dakota, in the above entitled action, wherein Sioux Remedy Company is

Plaintiff and appellant, versus F. M. Cope and D. C. Cope, Defendants and respondents, as the same now remains of record in said Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 12th day of January, A. D. 1912.

FRANK CRANE, *Clerk.*
By LESLIE PARRY,
Deputy Clerk.

23 On May 16, 1912 there was filed in this office in this action the

Opinion

of the Supreme Court of the State of South Dakota of which the following is a copy, to-wit:—

24 In the Supreme Court, State of South Dakota.

SIOUX REMEDY COMPANY, Plaintiff and Appellant,
vs.
F. M. COPE and D. C. COPE, Defendants and Respondents.

Appeal from Circuit Court of Turner Co.

Hon. Robert B. Tripp, Judge.
Joe Kirby, Attorney for Appellant.
Bogue & Bogue, Attorneys for Respondents.

Opinion.

Filed Dec. 11, 1911.

WHITING, *J.:*

Plaintiff sued to recover the amount claimed to be due upon the purchase price of certain goods alleged to have been sold defendants. The record before us does not disclose the contents of the pleadings, except that it does appear that the defendants, in their answer, set forth the contract under which they received the goods from the plaintiff. This contract, except as to name of the party of the second part, is identical with the contract before this court in the case of Sioux Remedy Co. v. Lindgren, 130 N. W. 49. When the case was called for trial, one of the defendants, called as a witness for plaintiff, testified to the execution of the contract at Centerville, S. D., and to the receiving of the goods thereunder; the contract was then received in evidence, and plaintiff rested. The parties then stipulated that plaintiff was a foreign corporation, and had not complied with the provisions of sections 883-885 of the Revised Civil Code of this state. "Thereupon defendants moved the court to direct a verdict for the defendants for the reason as shown by said stipula-

tion." This motion was granted, verdict rendered and entered, and plaintiff duly excepted." Judgment was rendered upon such verdict, and plaintiff appealed.

It is well to note that the cause now before us was before the trial court prior to the decision in the Lindgren case, wherein, under facts exactly like those in this case, this court held the transaction sued on to be one pertaining to interstate commerce, and therefore that it was not controlled by the sections of our statute above referred to. Respondent contends that this court did not hold in the Lindgren Case that the transaction was one pertaining to interstate commerce, but merely said: "Assuming in the case at bar that the plaintiff was a foreign corporation, and was engaged in the business of selling merchandise, it cannot be required to file its articles," etc. Respondent *has* apparently overlooked that part of the opinion wherein it was said: "It is contended by the appellant that this contract of sale constitutes interstate commerce, and therefore the plaintiff was not required to file its articles of incorporation or appoint a resident agent, as provided by the Civil Code of this state, in order to entitle it to maintain this action. We are of the opinion that the plaintiff (appellant) is right in this contention."

25 Respondents further contend that, even construing the Lindgren Case as having held that the transaction before the court therein was interstate commerce, yet, in the case now at bar, the judgment should be affirmed, because it is sustainable, under the record herein, upon other grounds than the one considered and passed upon in the Lindgren Case: First, because the contract in question is a commission contract, and not one of sale; second, because, for a reason not considered by this court in the Lindgren Case, the transaction before the court was one not pertaining to interstate commerce.

(1) This court held, in the Lindgren Case, that the contract then before the court—whether construed as it read, regardless of other matters, or whether construed in the light of surrounding circumstances—was clearly an agency contract, under which the second party was not liable, unless he sold some goods and retained the money. Relying upon such construction of the contract, respondents point out that it was incumbent upon plaintiff, as a part of its case, to have proven facts which, under such contract, would create a liability, and that, not having done so, the verdict and judgment were right, regardless of the correctness of the grounds upon which such verdict was in fact directed. While conceding the soundness of the rule of law which holds that a judgment correct on the merits should be affirmed, even though it were based, in the trial court, upon an erroneous ground, yet we think it should be applied only when the merits of the cause are clear, and not under a record such as we have before us in the case at bar. Only one question was presented to the trial court, and the appellant has brought to this court only such record as was necessary for the review of the trial court's ruling. As before noted, we have not the pleadings before us, and it may be that the answer therein admits a purchase of the goods, or admits that as agents they had sold some of the goods. These were

facts entirely immaterial upon a motion for direction of verdict, based upon the ground upon which the action herein was based, and appellant was in no manner required to anticipate a claim, not raised in the lower court, and fill its record with matters not pertinent to the ruling of the court. We have no way of knowing whether the judgment was correct upon the merits of the issues as raised by the pleadings.

In support of the second ground urged by respondents, it is argued that, inasmuch as under the contract, "the defendants were agents for the plaintiff, not for the purpose of soliciting orders for the plaintiff and sending them to the corporation outside of the state, but for the purpose of receiving, at the agents' place of business in the state of South Dakota, the goods described in the contract, and then selling them to the customers of the agents in South Dakota," the appellant was not engaged in interstate commerce. Respondents have cited many authorities in support of the above statement, but it seems to have escaped respondents' attention that the opinions in these cases are not directed to the question of the nature of the contract as between the principal and agent. These authorities clearly support the proposition that, if this appellant were suing one who had purchased of the respondents some of these consigned goods, and was seeking to recover the selling price, such suit would be based upon a transaction purely intrastate, and
26 the purchasers could rightfully plead appellant's noncompliance with said sections 883-885.

(2, 3) But the authorities all hold that, where it is contemplated by the parties to a sale, or to any other contract, no matter what its nature, that, as a part of the transaction or a necessary incident thereto, the goods, concerning which the contract is made, are to be shipped from one state to another, the transaction or contract is one pertaining to interstate commerce, and comes under the inhibition prohibiting interference, on the part of the state, with such commerce. It matters not whether the contract be one under which a party is to buy goods, or to sell them, or to rent them; the sole question is whether or not, as a part of the carrying out of such contract, it is contemplated that there shall be a shipping from one state to another of the identical goods to which the contract relates. So far as the parties hereto are concerned, the contract in question pertained to interstate commerce—to the shipping of the goods ordered—whether the consignees were purchasers, or whether they were merely agents of the consignor. A transaction very like the one before us was under consideration in Butler Bros. Shoe Co. v. United States Rubber Co. 156 Fed. 1, 84 C. C. 167, wherein that court said:

"The contract of January, 1903, when reduced to its lowest terms, was that for one year the complainant would send on the orders of the defendant from its factory and warehouse to the Eastern states shoes, boots, and rubber goods to the shoe company in Colorado, that the latter would make such advances to the complainant as it requested and would conduct the business and pay all the expenses of selling the goods for the factorage or commission, which consisted

of the difference between the agreed prices between the parties to the contracts and the selling prices to the purchasers from the factor. The question has been exhaustively argued whether this was a contract for a conditional sale or a contract of agency. It did not evidence a conditional sale, because there was no obligation of the rubber company to transfer the title to the shoe company for an agreed price, and no obligation of the shoe company to pay an agreed price for the goods. It was a contract of bailment for sale, not a contract of sale. In re Columbus Buggy Co. 143 Fed. 859, 74 C. C. A. 611. It was a contract of factorage. * * * Nor is the fact that these contracts did not evidence sales of the goods determinative of this question. A sale is not the test of interstate commerce. All sales of sound articles of commerce, which necessitates the transportation of the goods sold from one state to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between the citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce. 'Since the case of Gibbons v. Ogden, 9 Wheat., 1, 6 L. Ed. 23', said Chief Justice Waite, in Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S. 8, 24 L. Ed. 708, 'it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating
27 power of Congress. The contracts before us constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado from other states, and they necessarily constituted transactions of interstate commerce.

Caldwell v. North Carolina 187 U. S. 622 23 Sup. Ct. 229, 47 L. Ed. 336;

Wagner vs. Meakin 92 Fed. 76; 33 C. C. A. 577, 581, 584

Allen v. Tyson-Jones Buggy Co. 91 Tex. 22, 40 S. W. 393, 734;

Chattanooga, R. & C. R. Co. v. Evans 66 Fed. 809, 814, 14 C. C. A. 116;

Gunn v. White Sewing Machine Co. 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223;

Keating Implement & Machinery Co. v. Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417."

(4) As a final ground upon which respondents ask an affirmance of the judgment, they most earnestly urge that the trial court was right in holding that said sections 883-885 apply to this transaction, and that this court was in error in holding to the contrary in the Lingren Case. Every Court should be free to acknowledge its errors, and should hasten to correct the same, except when under a ruling of the court some rule of property has become long established and fixed, an overturning of which would work great wrong to those

who have relied on the law as declared. The decision in the Lindgren Case neither involves a rule of property, nor is such decision of long standing. This court, in the case of Iowa Falls Mfg. Co., v. Farrar, 19 S. D. 632, 104 N. W. 449, in the year 1905, without dissent, held unequivocally that said sections 883-885 did apply to contracts pertaining to interstate commerce, and the reasoning of the learned justice who wrote that opinion seems to us unanswerable. While not trying to excuse the error into which this court fell in the Lindgren case, it is perhaps explainable largely, in that the conclusion reached in that case was clearly correct upon another ground discussed, which led us to not as carefully consider the question now before us as we should have done, if such decision had depended solely upon the determination of the proposition now before us. It was the contention of the respondent in the Lindgren Case that no question of interstate commerce was involved therein; and, furthermore, that the contract was one of agency. It will thus be seen that no issue was raised by the respondent, in the Lindgren Case, in regard to the validity of the provisions of said sections 883-885, when applied to interstate commerce, and, holding as we did, that the contract was one of agency, and the evidence clearly showing that there was nothing due appellant thereunder, we were in no manner required to consider the question now before us, and were not aided, in our consideration of the same, by any briefs or argument in support of the validity of such sections when applied to interstate commerce.

28 (3) Said Sections 883-885 read as follows:

"SEC. 883. No corporation created or organized under the laws of any other state or territory shall transact any business within this state, or acquire, hold and dispose of property, real, personal or mixed, within this state, or sue or maintain any action at law or otherwise, in any of the courts of this state, until such corporations shall have filed in the office of the secretary of state, a duly authenticated copy of its charter or articles of incorporation, or shall have complied with the provisions of this section: Provided, that the provisions of this section shall not apply to corporations and associations created for religious and charitable purposes only.

"SEC. 884. Such charter or articles of incorporation shall be recorded in a book to be kept by the secretary of this state for that purpose.

"SEC. 885. Such corporation shall appoint an agent who shall reside at some accessible point in this state, duly authorized to accept service of process and upon whom such service of process may be had in any action in which said corporation may be a party, and service upon such agent shall be taken and held as due and personal service upon such corporation. A duly authenticated copy of the appointment of said agent shall be filed and recorded in the office of the secretary of state and register of deeds of the county where such agent resides, and a certified copy thereof by the secretary of state or register of deeds shall be conclusive evidence of the appointment and authority of such agent. Provided, that no action shall be commenced or maintained in any of the courts of this state by such

corporation, on any contract, agreement or transaction made or entered into in this state, by such corporation, unless such corporation shall have fully complied with the provisions of this article. Provided, further, that it shall be unlawful for any person to act within this state as agent or officer of any foreign corporation unless such corporation shall have appointed an agent as hereinbefore provided, and every person so acting as such agent or officer of any such corporation shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten nor more than one hundred dollars and imprisoned in the county jail not less than ten nor more than thirty days, or both such fine and imprisonment at the discretion of the court. That justices of the peace shall have concurrent jurisdiction with the circuit courts to hear and determine any criminal action arising under the provisions of this act."

This appellant, in the Lindgren Case, cited, in support of the proposition that our statute had no application to contract pertaining to interstate commerce, the following authorities:

Flint & Walling Mfg. Co. v. McDonald 21 S. D. 526, 114 N. W. 684, 14 L. R. A. (N. S.) 673, 130 Am. St. Rep. 735;

Rex Buggy Co. v. Dinneen 23 S. D. 474, 122 N. W. 433;

Herman Bros. Co. v. Nascimos 46 Colo. 208, 103 Pac. 391;

29 McNaughton Co. v. McGirl 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. Rep. 610;

Ware v. Hamilton-Brown Shoe Co. 92 Ala. 145, 9 South. 136;

Coit & Co. v. Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819;

Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961;

Atlas Engine Works v. Parkinson (D. C.) 161 Fed. 223;

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 151, 28 L. Ed. 1137;

Sucker State Drill Co. v. Wirtz 17 N. D. 313, 115 N. W. 844, 18 L. R. A. (N. S.) 134;

Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254;

Ammons v. Brunswick-Balke-Collender Co. 141 Fed. 570, 72 C. C. A. 614;

Butler Bros. Shoe Co. v. United States Rubber Co. 156 Fed. 1, 84 C. C. A. 167.

The opinion in the Lindgren Case calls attention to the fact that the case of Flint, etc. v. McDonald, supra, had no bearing upon the question then before the court, but all the other cases supra were cited in the opinion as supporting the contention of the appellant. We think a careful analysis of these decisions will show that not a single one is in point; that even those that might at first blush seem to support appellant's contention are based upon statutes so radically different from ours that they can have no effect as authority, even under the rule of analogy. In Sucker State Drill Co. v. Wirtz, as was said by the court, "The sole question raised upon this appeal involves the validity of the contract under which the drills were

sold." It is not the validity of the contract which is questioned in the case at bar; its validity is unquestioned; the question is as to the enforceability of it at the time action was brought. In McNaughton v. McGirl, Atlas Engine Works v. Parkinson, and Cooper v. Ferguson, the validity of the contract was the sole question. The state of Michigan has a statute requiring foreign corporations to pay a franchise fee, and declaring all contracts made by them void until such fee is paid. As will be noted, this statute goes to the validity of the contract, and for that reason in Coit v. Sutton, it was held that it did not apply to interstate commerce transactions. In fact, the courts uniformly held that any law attempting to lay a tax on interstate commerce is invalid. The Michigan case, however, directly recognizes the right of the state, by virtue of its police power, to place restraint upon interstate commerce. Norfolk & W. Ry. Co. v. Sims was also a case construing a statute, which attempted to tax through the requirement of a license or franchise fee. Ware v. Hamilton-Brown Shoe Co. is clearly not in point. Ammons vs. Brunswick-Balke-Collender Co. was a case wherein arose no question of interstate commerce, and in which the statute under consideration was
30 a federal one. In Greek-American Sponge Co. v. Richardson Drug Co., the court had before it the statute of Wisconsin, providing for the filing of articles of incorporation of foreign corporations in the office of the secretary of state, which statute provides: "Every contract made by or on behalf of any such association, company, corporation or copartnership affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them." Thus, again, we have a statute affecting the validity of contracts, and which was held to be invalid as applied to interstate commerce.

(6) It might be contended that, under the construction placed by this court upon the "proviso" in section 885 of our statute, such section affects the validity of the contract, instead of merely going to the right of action, as is clearly provided by section 883 (American Copying Co. v. Eureka Bazaar, 20 S. D. 526, 108 N. W. 15), and that such proviso, under several of the above authorities, would be invalid, so far as contracts involving interstate commerce are concerned. In answer we would state that, if the holding in the Bazaar case is sound, it must necessarily follow that, under some of the above authorities, such part of section 885 would not apply to transactions pertaining to or involving interstate commerce; yet it leaves section 883 in full force. Paraphrasing the words of the territorial court, in American Button Hole Co. v. Moore, 2 Dak. 280, 8 N. W. 131: "The right to have contracts enforced upon trial is one thing, but the right to sue and be heard is another and quite distinct matter." We maintain that, while it might be held that no state statute can affect the validity of a contract pertaining to interstate commerce, and therefore cannot deny the right to have such contract enforced, if it is otherwise valid, yet the state, under its police power, does have the right to place reasonable conditions upon the right of any person

or corporation to use its courts. Furthermore, the writer of this opinion, although he concurred in the majority opinion of this court in the case of Reed v. Todd, 25 S. D. 421, 127 N. W. 527, in which opinion there is dictum supporting the construction of the proviso of section 885 found in the Bazaar case, does not agree with such dictum, and concurs fully with the views of Justice Corson, as expressed in his most able dissenting opinion in the Bazaar Case.

The opinion in the Lindgren Case placed apparently great weight upon Butler Bros. Shoe Co. v. United States Rubber Co., as an authority supporting appellants' contention. The decision in such case is certainly a most able one; but there was not involved therein the question now before us, and it contains not one syllable in any way touching such question. The court was called upon to construe the Colorado statute. It is well to consider the provisions of such statute as it was also before the court in the case of Herman Bros. Co. v. Nasiacos. Quoting from the Shoe Co. case, we learn that: "The Constitution and the statutes of Colorado by their terms prohibit any foreign corporation from doing any business, exercising any
31 corporate power, acquiring or holding any property, or prosecuting or defending any suit in the state, unless it has first filed with the Secretary of State a certificate of its incorporation, a written appointment of an agent in the state to accept service of process, and a written specification of a principal place of business in the state, has paid to the Secretary of State $30 for the first $50,000 and 50 cents for each additional $1,000 of its capital stock, a fee of $5, and numerous other fees for filing papers and issuing his certificate, and has paid to the Auditor of the State an annual license fee of 2 cents for each $1,000 of its capital stock. Const. Colo. art. 15, §10; 1 Mills' Ann. St. §§499, 500; Sess. Laws Colo. 1901, p. 121, c. 52, §10; Sess. Laws 1902, p. 73, c. 3, §64. The statutes of Colorado further provide that a failure to file this certificate of incorporation shall render each officer, agent, and stockholder of a foreign corporation liable for all contracts made in Colorado while it is in default (1 Mills' Ann. St. §501), and that a failure to pay the annual license tax shall deprive the corporation absolutely of all rights and privileges to do business in the state, and shall constitute an absolute defense to all actions, suits, and proceedings in law or equity brought by the corporation in any court of competent jurisdiction within the limits of the state, until the tax is paid. Sess. Laws Colo. 1902, p. 74, c. 3, §66. It is obvious that by the literal terms of this Constitution and these statutes no foreign corporation may lawfully exercise any corporate power, maintain any suit in any state or federal court, or do any business of any kind whatever in the state of Colorado, unless it first pays the license fees which that state has prescribed for permission to do business therein." The above shows how different a statute that of Colorado is from the one before us for construction. An examination of chapter 52, Session Laws Colo. 1901, reveals that its title is as follows: "An act relating to corporations, and prescribing certain fees to be paid by corporations, foreign and domestic, and to repeal certain acts and all acts and parts of acts in conflict therewith." A reading of the

act in full shows that its one purpose is the raising of revenue; that while fees, large and small, are imposed for almost everything, and while the payment of these fees is made a condition precedent to the doing of business or the resorting to the courts, yet there is not one provision of such statute, requiring the appointment of an agent, or the performance of any act, the effect of which would be to give an opportunity to bring foreign corporations into court, that is made a condition precedent to doing business or bringing actions.

(7) Justice Sanborn, in the Shoe Case, lays down the following, with which we fully concur: "The Constitution of the United States and the acts of Congress in pursuance thereof are the supreme law of the land. Under that Constitution and those laws, a corporation of one state has at least three absolute rights which it may freely exercise in every other state in the Union, without let or hindrance from its legislation or action: (1) Every corporation, empowered to engage in interstate commerce by the state in which it is created,
32 may carry on interstate commerce in every state in the Union, free of every prohibition and condition imposed by the latter. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 8, 24 L. Ed. 708; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 736, 737, 5 Sup. Ct. 739, 28 L. Ed. 1137. * * * (2) Every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact the business requisite to discharge the duties of that employment in every other state in the Union, without permission granted or conditions imposed by the latter. Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 186, 8 Sup. Ct. 737, 31 L. Ed. 650; Horn Silver Mining Co. v. New York, 143 U. S. 305, 315, 12 Sup. Ct. 403, 38 L. Ed. 164. (3) Every corporation of each state has the absolute right to institute and maintain in the federal courts, and to remove to those courts for trial and decision, its suits in every other state, in the cases and on the terms prescribed by the acts of Congress. Insurance Co. v. Morse (20 Wall.) 445, 453, 456, 22 L. Ed. 365; Barron v. Burnside, 121 U. S. 186, 200, 7 Sup. Ct. 931, 30 L. Ed. 915." And by way of summing up, Justice Sanborn further said: "The unavoidable result is that, if the Constitution and the statutes of Colorado are to be interpreted to mean, as they clearly read, to prohibit every foreign corporation from exercising any corporate power whatever, or doing any business whatever, in the state, unless they pay the fees and the annual license tax which this legislation requires as a condition thereof, they are unconstitutional and void, so far as they apply to interstate commerce conducted by foreign corporations, or suits for and against them in the national courts."

All that was held in the Herman Bros. Co. Case is that the provision of the Colorado statute above referred to does not apply to foreign corporations engaged solely in interstate commerce, citing International Trust Co. v. Leschen, 11 Colo. 299, 92 Pac. 727, where the question involved was the right of the state to require the payment of the fees provided by said chapter 52, Laws Colo. 1901, as a condition for doing business or resorting to the courts of such state. The case of Rex Buggy Co. v. Dinneen, decided by this court and

cited in the Lindgren case, was one in claim and delivery to recover goods virtually stolen from plaintiff in the state of Iowa, brought into this state and sold to defendant. While plaintiff had not filed its articles at time of action brought, it had fully complied with the law before ans-er. Remembering that failure to file articles of incorporation is raised by a plea in abatement, and in no manner affects the merits, we believe there were, in the Buggy Co. Case, good grounds for affirming the trial court, without basing such affirmance upon any question of interstate commerce.

From what we have said above, it is clear that the holding in the Lindgren Case receives no support from the authorities cited therein, and we have been unable to find one single authority supporting its holding.

33 What is meant when it is said that "every corporation, empowered to engage in interstate commerce by the state in which it is created, may carry on interstate commerce in every state in the Union, free of every prohibition and condition imposed by the latter" (Shoe Co. Case, supra)? Viewing this statement in the light of the decisions of the courts, state and national, there should be added thereto, "except reasonable police regulations." Railroads are certainly engaged in interstate commerce, their business being of the very essence of such commerce, to-wit, the transferring of the subject of such commerce from one state to another; and yet how frequently courts have sustained state regulations affecting directly such business of transportation. As was said by the Supreme Court of Illinois, in the case of People v. Chicago, etc. R. Co., 223 Ill. 581, 79 N. E. 141, 7 Am. & Eng. Ann. Cas. 1: "A state, under its inherent and reserved police power, may enact any law promotive of the peace and good order of society, for the preservation of life and health, or conducive to the comfort, convenience, and welfare of the people. It is no valid objection that such law operates on the subjects and means of interstate commerce and persons engaged therein, unless, in this effect, it lays some burdens or restrictions thereon which otherwise would not exist. Thus states may exclude animals having contagious diseases. Reid v. Colorado, 187 U. S. (137, 23 Sup. Ct. 92, 47 L. Ed. 108). They may prohibit the consolidation of competing or parallel lines of railroad. Louisville etc. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714 (40 L. Ed. 849). They may compel the erection and maintenance of fences and cattle guards. Minneapolis etc. R. Co. v. Emmons, 149 U. S. 364, 13 Sup. Ct. 870 (37 L. Ed. 769). They may compel engineers operating freight and passenger engines to have their eyes examined. Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564 (31 L. Ed. 508). They may provide for the separation of white and colored races on trains (Louisville etc. R. Co. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348 (33 L. Ed. 784)), and prohibit the running of freight trains on Sunday (Hennington v. Georgia 163 U. S. 299, 16 Sup. Ct. 1086 (41 L. Ed. 166)). In all these cases, and many others of like character, the state laws in question operated either on subjects or means of or the persons engaged in interstate commerce, and they were sustained on the ground that they were properly within the reserved powers

of the states, and did not, in their effect and intention, operate, except incidentally, as a restriction or burden on commerce between the states. These cases, and others in line with them, recognize the right of the state to adopt such laws as in the wisdom of the Legislature, will subserve the best interests of the people, and enforce them against all persons and corporations that come within the territorial jurisdiction, subject to the limitation that no restrictions or burdens shall be laid on interstate commerce. It follows that all the powers which inhere in the people of a state, and which have not been expressly granted to the United States, and not prohibited to the states, still reside with the people with respect to common carriers of interstate commerce, as well as to persons and companies engaged in other lines of business."

34 In the case of Commonwealth v. Chesapeake & O. Ry. Co., 101 Ky. 159, 40 S. W. 250, we have one wherein was presented a question very analagous to the one before us. The court was called on to construe a statute requiring every railroad operating in the state under a contract or lease "to have the same recorded in the office of the Secretary of State and in the county clerk's office of every county in which the road or any part thereof lies. * * *" The court said: "Counsel, erroneously, as we think, argue section 791, is in violation of the Constitution of the United States, because interfering with interstate commerce; for adoption of it by the General Assembly is plainly a proper and legitimate exercise of police power, belonging to each individual state, and necessary for the general welfare of the citizens thereof. The manifest purpose of the statute is to ascertain and identify the company having legal possession and control of each particular line of railroad within the state, in order, first, that taxes and public dues may be more readily and certainly collected, and obedience to law more effectually enforced; second, that persons having business intercourse with common carriers may know with whom to deal, or, if wronged or injured, may know against whom to seek remedy. In what way enforcement of such statute can possibly interfere with the power of Congress to regulate commerce between the states we are unable to conceive."

We must bear in mind at all times that the statute before us is the enactment of the legislative body of a sovereign state, a state whose only limitation of legislative power is to be found in its own Constitution, or that of the national government; there is every presumption supporting the validity of its laws. The greatest power of all those reserved by the people for their state government is comprised within the term "police power." We quote again the definition of that great jurist, Justice Shaw, who defined it as: "The power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." The federal power over interstate commerce is subject to the police power of the state when properly exercised. Who would question but what our statutes

aimed at the prevention of frauds, our recording laws, our anti-monopoly statute, and numerous others that might be mentioned, are valid, even when applied to transactions involving interstate commerce? And all such statutes directly place restrictions upon the creation of contracts.

Does the statute before us go so far as to in any manner restrain or impose conditions upon interstate commerce or contracts pertaining to such commerce? We are unable to see wherein it does. So far as this statute is concerned, corporations, as well as every one else, are left absolutely free to act and contract as they may see fit; but, if they desire at any time to call upon the state to enforce their contracts, or otherwise protect them in what they believe to be their rights, then, to the end that our citizens may be able to be on an equal footing with them, they must place themselves subject to the jurisdiction of all of our courts. Is this not a most reasonable exercise of the police power? If such a statute is not valid in a
35 case such as this, then certainly a statute, such as we have, requiring the filing of a certificate of the names of the copartners in case the partnership name is fictitious, would be invalid as against a contract pertaining to interstate commerce, and this even if such copartnership was a domestic one. Very analagous to the statute before us are those requiring undertakings to be given by non-resident plaintiffs. Are these statutes of force when an attempt is made to apply them in a case involving an interstate commerce transaction? Certainly they are, and yet they as certainly and directly tend to affect and control interstate commerce as does the statute under consideration.

We can add nothing to the strength of the reasoning found in the words of Justice Fuller in the Farrar Case, of those of the highest court of Kansas, as quoted in the Farrar Case. Since the decision in the Farrar Case, the Supreme Court of Kansas has again, in Osborne & Co. vs. Shilling et al., 74 Kan. 675, 88 Pac. 258, sustained the validity of their statute.

When the courts, state and federal, are a unit in upholding statutes which directly and in almost every conceivable method regulate and control the operation of railroads, the chief instrumentalities for carrying on of interstate commerce; when no court could question the validity, when applied to cases involving interstate commerce, of those numerous statutes designed to protect our people against fraud and oppression, of the other statutes providing the conditions under which (cases involving interstate commerce, as well as in all others), persons, natural and artificial, may gain access to our courts to litigate their rights—can there be the slightest question as to the validity of the statute before us, even when applied to the facts in this case, a statute which, it seems to us, can in no manner affect interstate commerce, and which certainly cannot possibly affect it, except incidentally, and never directly? We think not. The Supreme Court of the United States, in Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, said: "There can be no doubt as to the validity of these constitutional and statutory provisions, so far, at least, as they do not directly affect foreign and interstate commerce."

Certainly, when there is presented to us for consideration a statute so necessary for the protection of our people, we should resolve all doubts, if any there be, as to the validity of the statute in a given case, in favor of our people, at least until such time as the highest court in our land shall decree otherwise.

The judgment of the trial court is affirmed.

McCoy, J., concurs in the result only.

36 Corson, J. (Dissenting): I am unable to concur in the views expressed in the majority opinion, overruling the decision of this court in Flint & Walling Mfg. Co. vs. McDonald, 21 S. D. 526, 114 N. W. 684, 14 L. R. A. (N. S.), 673, 130 Am. St. Rep. 735; Rex Buggy Co. v. Dinneen, 23 S. D. 474, 122 N. W. 433; Sioux Remedy Co. v. Lindgren, 130 N. W. 49. I was of the opinion that after some fluctuation by this court in its decisions the right of a foreign corporation to enforce its interstate contracts, without complying with the law of this state, was at last definitely settled; but it seems in taking this view I am not supported by the majority of the court, though all of the judges seem to have concurred in at least two of the decisions of this court above cited.

These decisions, in my judgment, are sustained by the great weight of authority, as shown by the cases cited in those opinions and by the decision of the Court of Appeals hereinafter referred to. Mr. Justice Sanborn, with whom concurred Mr. Justice Van Devanter, then Circuit Judge, now a member of the United States Supreme Court, and District Judge Phillips, in the case of Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167, in a most exhaustive opinion, reviews, the cases upon this subject, and that court held, as appears by the headnote, that: "Every corporation empowered by the state of its creation to engage in interstate commerce may carry on that commerce in sound and recognized articles of commerce in every other state in the Union. Every prohibition, obstruction, or burden which the other states attempt to impose upon such business is unconstitutional and void. * * * Where a corporation of one state is engaged in both interstate and intrastate commerce in any other state, the prohibition of the conditioning by the state of its exercise of its right to do business within its borders, without discriminating between that which constitutes interstate commerce and that which constitutes intrastate commerce, is unconstitutional and void, so far as it relates to the former. * * * Interstate commerce in sound and well-recognized articles of commerce must be free, and any prohibition, obstruction or burden of it by a state by any method is unconstitutional. Such commerce may not be regulated by a state at all. The exclusive power to regulate commerce among the states is vested in Congress."

And that learned Court in its opinion says:

"The review of the decisions of the Supreme Court, relating to the power of a state to trammel or destroy the right of a corporation of another state to do business within its borders, in which we have indulged may have been tedious; but it may be profitable, if it serve

to correct the erroneous view that such a corporation has no such right, and that all its powers and privileges without the limites of the state of its creation are at the mercy of any state in which it attempts to do business * * *."

37 The Constitution of the United States and the acts of Congress in pursuance thereof are the supreme law of the land. Under that Constitution and those laws, a corporation of one state has at least three absolute rights which it may freely exercise in every other state in the Union, without let or hindrance from its legislation or action: (1) Every corporation empowered to engage in interstate commerce by the state in which it is created, may carry on inter-state commerce in every state in the Union, free of every prohibition and condition imposed by the latter * * * Every law of a state which attempts to destroy these rights or to burden their exercise is violative of the Constitution of the United States and void."

And the court in its opinion further says:

"Where Congress has passed no law regulating interstate commerce in well-recognized articles of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of a state which prohibits or restrains it at all is unconstitutional and void." That learned court further adds: "Many authorities have been examined which relate in some degree to the question which has now been decided. They are numerous, various and conflicting, and any attempt to reconcile them must fail. The reasons for the conclusion reached have been stated, and some of the authorities examined are here cited for reference"—citing over a half a page of authorities.

It would be difficult, in my judgment, for the court to more clearly sustain the three last decisions of the court than is done in that opinion, and with a few immaterial changes it might, in my judgment, be entitled Sioux Remedy Co. v. Lindgren. The effect of the decision of this court, is, as I understand it, practically to review the decision of the Court of Appeals, and to hold in effect that that decision of the Court of Appeals was wrong; and that the state of South Dakota is empowered to impose such restrictions as it may deem proper upon the right of a foreign corporation to enforce its contracts against citizens of this state; and that, unless a foreign corporation complies with the provisions of the law of this state, its contracts are unenforceable.

While the decision of the Court of Appeals may not be binding upon this court, it certainly is entitled to great weight, in view of the fact that this state constitutes a part of the Circuit Court of the Eighth Judicial Circuit, and the decision was made by a court having jurisdiction to decide questions involving the Constitution and laws of the United States. Of course, the United States District Court for this state will follow the decision made by the Court of Appeals; and hence it seems to me to be desirable that the decisions of the Supreme Court of this state should, as far as possible, be in harmony with the decisions of that court. Had this action been instituted to recover an amount in excess of $2,000 in the United

States District Court for this state, and the pleadings and admissions been the same as appears in the record in this case, in my opinion, that court would have considered it its duty to direct a verdict in favor of the plaintiff.

38 It would seem to me, therefore, to be unwise for this court to overrule three of its own decisions on the construction to be given to our state laws which are fully sustained by the decision of the United States Court of Appeals, and thereby produce a direct conflict between our decisions and that of the Circuit Court of Appeals, especially where it is conceded that the decisions prior to the decision of the Court of Appeals "are in hopeless conflict" (13 Am. & Eng. Enc. of Law, 875; 6 Thompson on Corporations, ¤7950), and so much in conflict that the learned Courts of Appeals would not attempt to reconcile them. It is not surprising, therefore, that this court, in view of the "conflicting" and "irreconcilable decisions" in the earlier cases, was inclined to sustain our state law. But, upon more full and careful examination of the authorities, I understood we arrived at the same conclusion as that reached by the Circuit Court of Appeals in the Rubber Case, viz., that this state had no power to impose any conditions or terms upon the right of foreign corporations to enforce interstate contracts as against citizens of this state.

The question in this case is, not to what extent interstate commerce may be burdened by the law of this state, but whether or not any burden can be imposed upon that commerce, except in cases involving the sale of intoxicating liquors, which are specially provided for in what is known as the Wilson bill (Act Aug. 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177)), and as to purely police regulations. Clearly there is nothing in the record in this case that takes it out of the ordinary contracts for the sale of sound articles of commerce, and nothing involving the exercise of the police powers of the state.

It will be observed by an examination of the cases of Flint etc. v. McDonald and Sioux Remedy Co. v. Lindgren, supra, that a large number of decisions were cited to sustain the views expressed in those opinions, and also cases cited in the opinion of Rex Buggy Co. v. Dinneen, supra. I shall not attempt in this dissenting opinion to review those decisions, but I am confident that they will be found to sustain the views expressed in those cases. A number of the cases cited in those opinions were cited in the Rubber Case, and some of the quotations made in our opinions were also made by Judge Sanborn in that case. The Rubber Case was not cited in the McDonald case, as the opinion in the former case had not been reported at that time.

In my opinion, therefore, the judgment of the circuit court of Turner County, and order denying a new trial, should be reversed.

[Endorsed:] Opinion. State of South Dakota, County of Turner Sioux Remedy Co., Pl'tff, vs. F. M. Cope and D. C. Cope, Def'ts.

39 UNITED STATES OF AMERICA:

In Supreme Court.

SIOUX REMEDY COMPANY, Plaintiff in Error,
vs.
F. M. COPE and D. C. COPE, Defendants in Error.

Statement of Errors, etc.

To the Honorable Clerk of said Court and the above named Defendants in Error:

SIRS: Please Take Notice That the Plaintiff in Error intends to rely on the following errors claimed by it to have been committed upon the trial of this action as follows:

I. The Trial Court erred in holding that the Sioux Remedy Company, an Iowa corporation, could not maintain an action in the courts of the State of South Dakota to recover the value of merchandise sold by it to the Defendants in Error in Iowa and there placed with a common carrier for delivery to the Defendants in Error in South Dakota without having complied with Sections 883 and 885 of the Civil Code of the State of South Dakota, which are as follows:

SEC. 883. "No corporation created or organized under the laws of any other state or territory shall transact any business within this state (South Dakota) or sue or maintain any action at law, or otherwise, in any of the courts of this state until such corporation shall have filed in the office of the Secretary of State a duly authenticated copy of its charter or articles of incorporation."

SEC. 885. "Such corporation shall appoint an agent who shall reside at some accessible point in this state, duly authorized to accept service of process and upon whom such service of process may be had in any action in which said corporation may be a party and service upon such agent shall be taken and held as due and
40 personal service upon such corporation. A duly authenticated copy of the appointment of such agent shall be filed and recorded in the office of the Secretary of State and register of deeds of the county where such agent resides; provided, that no action shall be commenced or maintained in any of the courts of this state by such corporation on any contract, agreement or transaction made or entered into in this state by such corporation unless such corporation shall have fully complied with the provisions of this article."

II. That so far as said Sections 883 and 885 of said Civil Code prohibit this Plaintiff in Error from maintaining an action in the courts of the State of South Dakota, based on the sales of merchandise made in a sister state, it is in conflict with the constitution of the United States and the Acts of Congress, and is an undue interference by said state with interstate commerce. That by depriving this Plaintiff in Error of its right to maintain such action, deprives it of its property without due process of law.

III. That the said Trial Court erred in rendering its judgment in favor of said Defendants in Error and against the said Sioux Remedy Company.

IV. That the Supreme Court of the State of South Dakota erred in sustaining said judgment of said Trial Court.

V. That this Plaintiff in Error, the Sioux Remedy Company, claims under the Constitution of the United States and the laws of Congress the right to maintain said action in the courts of the State of South Dakota and have the same adjudicated in the same manner and way on its merits as would take place between the citizens of the State of South Dakota, and further claims that the action of said court is to deprive this Plaintiff in Error of the right to carry on interstate commerce, and confiscate its property by depriving it of the privilege of enforcing its rights.

41 You Are Further Notified That the said Plaintiff in Error thinks it necessary and requests that the following parts of the record be printed for use of the Supreme Court, to-wit:

(1) Complaint.
(2) Answer.
(3) Bill of Exceptions.
(4) Stipulation as to Foreign Corporation.
(5) Verdict.
(6) Judgment of Circuit Court.
(7) Judgment of Supreme Court.
(8) Opinion rendered by Supreme Court.
(9) Writ of Error.
(10) Citation with Admission of Service.
(11) Undertaking or Bond.
(12) Statement of Errors as above set forth.

JOE KIRBY,
Attorney for Plaintiff in Error, Sioux Remedy Company, Sioux Falls, S. D.

[Endorsed:] 692/12. 23,267. In Supreme Court of United States. Sioux Remedy Co. vs. F. M. and D. C. Cope. Service of the within admitted by copy delivered to us this 27th day of June 1912. Alan Bogue, Jr., C. O. Bailey, J. H. Vorhees, Att'y for Def'ts in Error.

42 [Endorsed:] File No. 23,267. Supreme Court U. S. October Term, 1912. Term No. 692. Sioux Remedy Company, Plaintiff in Error, vs. F. M. Cope and D. C. Cope. Statement of errors and designation by plaintiff in error of parts of record to be relied on, and acceptance of service. Filed July 1, 1912.

Endorsed on cover: File No. 23,267. South Dakota Circuit Court of Turner County. Term No. 692. Sioux Remedy Company, plaintiff in error, vs. F. M. Cope and D. C. Cope. Filed June 22d, 1912. File No. 23,267.

Supreme Court, U. S.
FILED.
DEC 2 1912
JAMES H. McKENNEY,
CLERK.

No. 602.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. [redacted] 1914

SIOUX REMEDY COMPANY,
Plaintiff in Error.
vs.
F. M. COPE and D. C. COPE,
Defendants in Error.

Error to Supreme Court South Dakota.

Brief and Argument for Plaintiff in Error.

JOE KIRBY,
C. E. MORE,
Attorneys for Plaintiff in Error.
A. W. BULKLEY,
Of Counsel.

CHAMPLIN LAW PRINTING CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

SIOUX REMEDY COMPANY,
Plaintiff in Error.

vs.

F. M. COPE and D. C. COPE,
Defendants in Error.

Error to Supreme Court South Dakota.

Brief and Argument for Plaintiff in Error.

This writ of error is brought to review the judgment of the Supreme Court of the State of South Dakota, which affirmed a judgment of the Circuit Court of Turner county, South Dakota, in a suit by plaintiff in error against defendants in error. The suit was to recover from the defendants in error the sum of eighty dollars ($80) for goods, wares and merchandise which the plaintiff in error sold to defendants in error about the sixteenth of July, 1909.

The record shows that the plaintiff in error is a corporation organized and doing business under and by virtue of the laws of the State of Iowa (Rec. 12), with its principal place of business at Algona, Iowa.

The contract is set forth in the answer of the defendants in error as follows (Rec. 8):

"(Duplicate Agreement)

Made and entered into 26th day of July, 1909, by and between Sioux Remedy Company, of Algona, Iowa, party of the first part, and Cope Bros. of Centerville, County of Turner, State of of S. Dak. second party:

Witnesseth: That party of the first part agrees to ship unto second party, as soon as convenient, the goods hereafter set out; and to refill this order as often as the company sees fit to do so unless this agreement is canceled by mutual consent of both parties. Said second party agrees to receive said goods and to sell the same at and for the retail price as follows:

(Then follows list of goods and prices.)

* * * * * *

said second party agrees to pay to first party on demand the wholesale price as given above, of each article or package to be shipped, said goods to be consigned to second party at his address as above, unless otherwise directed hereon.

* * * * * *

The foregoing goods to be delivered f. o. b. cars at any distributing point.

And the first party does hereby also give the second party the right to sell the Sioux Remedy Co.'s remedies. Not subject to countermand by second party, and said second party further agrees to keep on hand and distribute such advertising material as may be furnished by the party of the first part, free to the second party; and should second party fail to fulfill any of the above agreements, and fail to sell the goods, then the Sioux Remedy Co. or their authorized employes will have the right to take the cabinet back and cancel this contract. The agent who makes this agreement for the company is a

special agent for that purpose. The above is the whole contract between the parties.

Sioux Remedy Co.,
Cope Bros.

Shipping place, Centerville, S. Dak."

and it was under that contract that the goods were sold and shipped by express from Algona, Ia., to Centerville, S. D. (Rec. 11), and delivered to the defendants in error.

In the trial court the defendant set up as a defense that plaintiff was a foreign corporation, not organized or existing by virtue of the laws of the State of South Dakota; also that the plaintiff corporation had not complied with sections 883 and 885 of the Revised Civil Code of the State of South Dakota relative to foreign corporations doing business within that state, in that the plaintiff had not filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation. nor had said plaintiff appointed an agent residing at some accessible point in that state, duly authorized to accept service of process and upon whom such service of process might be had in any action in which said corporation might be a party, and had not filed and recorded in the office of the secretary of state and register of deeds of the county where such agent resides a duly authenticated copy of the appointment of said agent, as defendant is informed and believes; and that on that account said action could not be maintained in any of the courts of that state, and the same should be dismissed and abated (Rec. 7).

It was stipulated between the parties that the plaintiff was a foreign corporation, and that it had not complied with the above laws of the State of South Dakota (Rec. 12) and thereupon the defendants moved the court to direct a verdict for the defendants for the reasons shown by said stipulation (Rec. 12), which motion was granted and verdict rendered and entered as is now on file with the clerk. To which direction of verdict plaintiff duly excepted and said exception was settled. Thereupon the court directed that the jury find the issues for the defendants upon all the issues pertaining to the defense set up in the first three paragraphs in defendants' answer, in reference to the right of the plaintiff to maintain this action, and the jury rendered a verdict accordingly (Rec. 13-14). Upon which the court entered judgment for the defendants, dismissing plaintiff's complaint and cause of action with costs for the reason (Rec. 14) that plaintiff had not complied with sections 883 and 885 of Revised Civil code.

Thereupon an appeal was taken to the Supreme Court of the State of South Dakota, which affirmed the judgment of the trial court, using the following language in its opinion:

> "Does the statute before us go so far as to in any manner restrain or impose conditions upon interstate commerce or contracts pertaining to such commerce? We are unable to see wherein it does. So far as the statute is concerned, corporations, as well as everyone else, are left absolutely free to act and contract as they may see fit; but, if they desire at any time to call upon the state to en-

force their contracts, or otherwise protect them in what they believe to be their rights, then to the end that our citizens may appear to be on equal footing with them, they must place themselves subject to the jurisdiction of all our courts. Is not this a most reasonable exercise of police power? If such a statute is not valid in a case such as this, then certainly a statute such as we have requiring the filing of a certificate of the names of the co-partners in case the partnership name is fictitious, would be invalid as against a contract pertaining to interstate commerce, and this even if such a co-partnership was a domestic one. Very analogous to the statute before us are those requiring undertakings to be given by non-resident plaintiffs. Are these statutes of force when an attempt is made to apply them in a case involving an interstate commerce transaction? Certainly they are; and yet they as certainly and directly tend to affect and control interstate commerce as does the statute under consideration.

"We can add nothing to the strength of the reasoning found in the words of Justice Fuller in the *Farrar* case, or those of the highest court of Kansas, as quoted in the *Farrar* case. (See *Iowa Falls Mfg. Co.* v. *Farrar*, 19 S. D. 632; 104 N. W. 449.)

"Since the decision of the *Farrar* case, the Supreme Court of Kansas has again (in *Osborne & Co.* v. *Shilling et al.*, 74 Kan. 675; 88 Pac. 258) sustained the validity of their statute."

ERRORS RELIED ON.

The errors relied upon are as follows:

(1) In deciding that this plaintiff could not maintain an action in the State of South Dakota

to recover the value of merchandise sold to the defendants at Algona, Iowa, and delivered to a common carrier for delivery to said defendants at Centerville, South Dakota, without having complied with sections 883 and 885 of the civil code of the State of South Dakota.

(2) That, so far as said sections 883 and 885 of said civil code prohibit this plaintiff from maintaining an action in the courts of the State of South Dakota, based on the sales of merchandise made in a foreign state from South Dakota, it is in conflict with the constitution of the United States and the acts of Congress, and is an undue interference by said state with interstate commerce, and by depriving this plaintiff of its right to maintain such action, deprives it of its property without due process of law.

(3) That the said trial court erred in rendering its judgment in favor of said defendants and against the said Sioux Remedy Company.

(4) That the Supreme Court of the State of South Dakota erred in sustaining said judgment of said trial court.

(5) That this plaintiff, Sioux Remedy Company, claims under the constitution of the United States and the laws of Congress the right to maintain said action in the courts of the State of South Dakota and having the same adjudicated in the same manner and way on its merits as would take place between the citizens of the State of South Dakota, and further claims that the action of said court is to deprive this plaintiff of the right to

carry on interstate commerce and confiscate its property by depriving it of the privilege of enforcing its rights without due process of law.

The Law in Question.

The Civil Code of the State of South Dakota, sections 883, 884 and 885, reads as follows:

> "Sec. 883. *No corporation created or organized under the laws of any other state or territory* shall transact any business within this state, or acquire, hold and dispose of property, real, personal or mixed, within this state, *or sue or maintain any action at law or otherwise, in any of the courts of this state* until such corporationn shall have filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation, or shall have complied with the provisions of this section; provided, that the provisions of this section shall not apply to corporations and associations created for religious and charitable purposes only.
>
> "Sec. 884. Such charter or articles of incorporation shall be recorded in a book to be kept by the secretary of state for that purpose.
>
> "Sec. 885. Such corporation shall appoint an agent who shall reside at some accessible point in this state, duly authorized to accept service of process and upon whom such service of process may be had in any action in which said corporation may be a party, and service upon such agent shall be taken and held as due and personal service upon such corporation. A duly authenticated copy of the appointment of said agent shall be filed and recorded in the office of the secretary of state and register of deeds of the county where agent resides, and a certi-

fied copy thereof by the secretary of state or register of deeds shall be conclusive evidence of the appointment and authority of such agent; provided, that no action shall be commenced or maintained in any of the courts of this state by such corporation on any contract, agreement or transaction made or entered into in this state, by such corporation, unless such corporation shall have fully complied with the provisions of this article; provided further, that it shall be unlawful for any person to act within this state as agent or officer of any foreign corporation unless such corporation shall have appointed an agent as hereinbefore provided, and every person so acting as such agent or officer of any such corporation shall be fined not less than ten nor more than one hundred dollars and imprisoned in the county jail not less than ten nor more than thirty days, or both, such fine and imprisonment at the discretion of the court. That justices of the peace shall have concurrent jurisdiction with the circuit courts to hear and determine any criminal action arising under the provisions of this act."

BRIEF OF ARGUMENT.

"A."

THE STATE OF SOUTH DAKOTA CANNOT DENY THE PLAINTIFF IN ERROR HAD THE RIGHT TO SUE IN ITS COURTS, BECAUSE THE DENIAL OF SUCH A RIGHT IS AN INTERFERENCE WITH AND A BURDEN UPON INTERSTATE COMMERCE.

The laws of South Dakota, above quoted, are dependent upon each other and are all dependent upon the fact that the corporation *must be doing business in the state* before it can be denied the privilege of the courts of the state. This raises the question—what is the doing of business in a state as distinguished from interstate commerce business? From the contract of purchase set forth in the pleadings and offered in evidence by the plaintiff, it appears that the contract signed was between the Sioux Remedy Company of Algona, Iowa, and Cope Bros. of Centerville, South Dakota. "That the party of the first part agrees to ship unto second party as soon as convenient the goods hereinafter set out, and to refill this order as often as the company sees fit to do so, unless this agreement is canceled by mutual consent of both parties. * * * Said second party agrees to pay to first party, on demand, the wholesale price as given above on each article or package to be shipped, said goods to be consigned to said second party at his address as above unless otherwise directed hereon. * * * The agent who makes

this agreement for the company is a special agent for that purpose. The above is the whole contract between the parties."

(Signed) Sioux Remedy Company.
Cope Bros.,
Shipping place, Centerville, South Dakota.

It therefore appears that the contract between the defendants in error and the plaintiff in error was for the purchase of goods to be shipped from Algona, Iowa, to Centerville, South Dakota, where the defendants in error had their place of business. The contract was for goods not then located in the state.

The defense submitted and relied on was, that the plaintiff was a foreign corporation and had not complied with sections 883 and 885, above quoted, of the Revised Civil Code of the State of South Dakota, and it is that defense that is sustained by the Supreme Court of the state.

The Supreme Court of the state bases its decision on the police power of the state, and holds that under police regulation or power it can deny a foreign corporation in any kind of a transaction, whether protected by any clause of the constitution of the United States, any redress in the courts of this state against any citizen or resident of the state unless it has complied with that law. In other words, even if the transaction between the foreign corporation and the citizen of South Dakota is purely and simply an interstate commerce transaction, it yet requires the foreign corporation to come into that state with a copy of its charter and pay the secretary of state for recording that charter, and

appoint an agent in that state, and pay for that privilege, and become amenable to the laws of that state, where it can be sued by anybody, whether a resident of that state or otherwise, in the courts of that state, before it will be permitted to maintain a suit to enforce such interstate contract in the courts of the state.

While the burdens are small, the fees being for the filing and examining of the articles of incorporation (ten dollars) paid to the secretary of state for examining, filing and recording; appointment of resident agent of a foreign corporation and issuing certificate of appointment (ten dollars) and for recording the articles of incorporation (25 cents per folio of one hundred words); also the fees of the register of deeds which will vary in the length of the appointment; still this requirement, however, if the transaction is an interstate commerce transaction, is a burden upon interstate commerce and therefore, so far as the statute is applied to foreign corporations doing interstate commerce business in the State of South Dakota must fall.

In the case of *Iowa Falls Mfg. Co.* v. *Farrar*, 104 N. W. 449, the Supreme Court of South Dakota held that the statute applied to an interstate commerce transaction, and that a foreign corporation could not maintain any action in its courts.

Afterwards in the case of *Flint-Walling Mfg. Co.* v. *McDonald*, 114 N. W. 684, the court, to our mind, absolutely reversed its former decision, although not mentioning it in its opinion, and again held the same

way in the case of *Sioux Remedy Company* v. *Lindgren*, 130 N. W. 49, decided February 23, 1911. The case at bar was decided December 11, 1911. In *Sioux Remedy Company* v. *Lindgren, supra*, the court held that the transaction was an interstate commerce transaction, and unequivocally held that for that reason the foreign corporation did not have to comply.

In the case of *Iowa Falls Mfg. Co.* v. *Farrar*, 104 N. W. 449, the court bases its decision quite largely upon the opinion in *Deere* v. *Wyland*, 69 Kan. 255 (76 Pac. 863), in which is quoted at length section 1283 of the Revised Statutes of Kansas of 1901, and in the opinion in the case at bar the learned justice quoted from the opinion in the case of *Osborne* v. *Shilling*, 74 Kan. 675 (88 Pac. 258), where the Supreme Court of Kansas again reiterates and reaffirms the validity of that statute and upholds the statute in question on the basis that Kansas has upheld its statute of similar import, notwithstanding the decision of this court in various cases nullifying the statute of Kansas.

This case is controlled by the cases of *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Wilson-Moline Buggy Company* v. *Hawkins*, 223 U. S. 713, reversed and remanded without opinion by this court, *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Green* v. *Southern Railway Co.*, 216 U. S. 400; *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor*, 223 U. S. 280.

In the case of the *Western Union Telegraph Co.* v. *Kansas & Pullman Company* v. *Kansas*, this court held that the law of Kansas, requiring foreign corporations to comply with the law and pay a certain franchise tax, is unconstitutional and void as against the plaintiffs in error in those cases, because it placed an unreasonable burden upon interstate commerce, and in the case of *International Text Book Company* v. *Pigg, supra*, as we understand it, this court held that because the law itself was invalid as placing such a burden upon interstate commerce, that part of the law which denied a foreign corporation the right to sue until it had complied with the law, was also unconstitutional and void; and that a foreign corporation engaged in interstate commerce or partially in interstate commerce, might maintain an action in courts of the state, and that the denial of the right to use the courts of the state was a burden upon interstate commerce as well as the requiring of a foreign corporation to take out a license and to pay certain fees in order to have a standing in the courts of the state—that is to say, any requirement which a state requires of a foreign corporation, however small it may be, if the foreign corporation is doing interstate commerce business that requirement, whether in money value or act of the party, is a burden upon interstate commerce. In other words, any requirement violates the commerce clause of the constitution if it is a burden upon interstate commerce, whether it be in the form of a license fee, the filing of papers and obtaining a permit, the appointment of an agent upon whom service of process can be had, requiring payment of

fees and performance of acts as a prerequisite to enforcing in its courts rights growing out of interstate transactions or otherwise.

"B."

A TRAVELING SALESMAN FOR A FOREIGN CORPORATION ENGAGED IN SOLICITING ORDERS IS NOT DOING BUSINESS IN THE STATE.

It has often been settled by this court and other courts that a transaction by which a traveling salesman goes into a state and solicits orders for goods in another state to be shipped into the state where the order is taken, is interstate commerce transaction and protected by the commerce clause of the federal constitution, and that anything that burdens that transaction is a burden upon interstate commerce. There are many authorities upon this proposition. We will name but a few of them:

Dozier v. *State of Alabama*, 218 U. S. 124.

Rearick v. *State of Pennsylvania*, 203 U. S. 507.

Norfolk & Western Ry. Co. v. *Sims*, 191 U. S. 441.

Caldwell v. *North Carolina*, 187 U. S. 622.

Stockard v. *Morgan*, 185 U. S. 27.

Stratford v. *City of Montgomery*, 20 So. Rep. 127.

Wrought Iron Range Co. v. *Campen*, 47 S. E. Rep. 658.

Norfolk & Western Ry. Co. v. *Pennsylvania*, 136 U. S. 114.

Schollenberger v. *Penna*, 171 U. S. 1.

In the case of *Dixie Cotton Felt Mattress Co.* v. *Stearns & Foster,* 185 Fed. Rep. 431, while it was alleged that a foreign corporation was doing business in the State of Illinois, the opinion of the Court of Appeals of the Seventh Circuit is directed against corporations "doing business" in this state in contravention of the act. The court said:

> "The purchase and sale of goods at Cincinnati in the State of Ohio, to be shipped into Illinois, is not doing business in Illinois. * * * Neither, in our opinion, is the purchase and sale of goods at Cincinnati in the State of Ohio, to be delivered to somebody in Illinois, from goods already deposited in a warehouse for that purpose, doing business in Illinois in the meaning of the statute, for in the one instance as much as in the other the transaction is not an Illinois transaction, but an interstate transaction—something clearly within interstate commerce. And while the State of Illinois has the right to regulate the terms upon which foreign corporations shall do business in that state, it has no right to regulate, or in any way burden, interstate commerce; and we will not assume, in the absence of the clearest expressions to that end, that a state intends to do that, in its statute, which it may not constitutionally do under the constitution of the United States."

The foregoing cases are so well known, and this court has reviewed them so often, it seems unnecessary to again even mention them, and a review of what they hold would be merely an imposition upon this court. The general statement made from the quotation in the case of *Dixie Cotton Felt Mattress Company* v. *Stearns & Foster,* by the court of appeals, very clearly states the proposition and but a little can be added to it.

A salesman may go into a foreign state and take orders for goods not then in the state, send these orders to his home office and they may be filled from such place of business. It is interstate commerce. The salesman may take the orders and send them to his home office and the home office directs those goods to be shipped from a warehouse within the state where the orders were taken, and it is interstate commerce. The orders may be taken by mail and they are interstate commerce. The sale of the goods in bulk or in original packages, when not injurious to public health and good morals within the state by an agent and representative of the foreign corporation in the state, is still interstate commerce business.

As is well said *in re Schollenberger, supra:* An agent may take his orders, send them to his home office in the foreign state, and the orders may be executed by the foreign corporation in the foreign state and shipped to the agent, and he deliver the goods and collect for them, even performing some work upon them, and still it is held by this court, in the cases of *Caldwell* v. *North Carolina, supra, Stratford* v. *Montgomery* and *Rearick* v. *State of Pennsylvania,* that the transaction is protected by the commerce clause of the federal constitution, and that no license tax or imposition may be imposed upon him; that the commerce clause of the federal constitution protects goods so long as they remain the property of the manufacturer and until the sale by the manufacturer to the purchaser, and the delivery and collection for the same; and it seems,

also, from the review of these cases, that the maintaining of a place of business in a state other than that in which the corporation is organized, at which its officers and agents make their headquarters merely for the purpose of buying goods for the non-resident corporation or selling the product of the non-resident corporation where their purchases or sales are purely and solely for the corporation and the agent does not go into any other business than that in which its principal is engaged, is protected by the commerce clause of the constitution.

The state courts have—many of them—recognized this right, and we might cite a list of authorities of some of the state courts upon that proposition:

Wrought Iron Range Co. v. *Campen*, 47 S. E. Rep. 658; N. C.

Ex Parte Massey, 92 S. W. 1083 (Texas Civil Appeals)

In re Kinyon, 75 Pac. Rep. 268 (Idaho).

Menke v. *State*, 97 N. W. Rep. 1020 (Neb.).

Rock Island Plow Co. v. *Peterson*, 101 N. W. Rep. 616 (Minn.).

Gunn v. *White Sewing Machine Co.*, 20 S. W. Rep. 591 (Arkansas).

Bruner v. *The Kansas-Moline Plow Co.*, 104 S. W. 816 (Okla.).

Flint-Walling Mfg. Co. v. *McDonald*, 114 N. W. 684 (S. D.).

Sucker State Drill Co. v. *Wirtz Bros.*, 115 N. W. 844 (N. D.).

Elwell v. *Adder Mach. Co.*, 116 N. W. 882 (Wis.).

Craig v. *Leschen & Sons Rope Co.*, 87 Pac. 1143 (Colo.).

Underwood Typewriter Co. v. *Piggott*, 55 S. E. 664 (Va.).

Three States Buggy & Implement Co. v. *Commonwealth*, 105 S. W. 971 (Ky.).

Mearcham v. *Lumber Co.*, 187 Pa. St. 12 (Pa.).

Coit v. *Sutton*, 102 Mich. 324 (Mich.).

Maxwell & Co. v. *Eddins*, 65 Mo. App. 439.

Toledo Com. Co. v. *Glenn Mfg. Co.*, 55 Ohio State, 217.

Milan M. & N. Co. v. *Gorten*, 93 Tenn. 590.

Beard v. *American Publishing Co.*, 71 Ala. 60.

Havens & Geddes Co. v. *Diamond*, 93 Ill. App. 557.

Brunswick-Balke-Collender Co. v. *Kraus*, 112 S. W. 20.

And the recent case of *Mulford Co.* v. *Curry*, 125 Pac. 236 (Cal.).

Thus we have at least twenty-two states of the Union which have decided directly that the state can not by a statute impose a burden upon interstate commerce, no matter what form it may take, and in these foregoing cases the courts of the various states have recognized the rights of the traveling salesman to go into the state and solicit orders for goods to be shipped into the state, and in all of the cases above referred to, and in many cases of this court, they recognize the invalidity of an attempt on the part of the state to burden interstate commerce.

"C."

SELLING GOODS IN BULK, ORIGINAL PACKAGES OR ARTICLES IS PROTECTED BY THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The goods described in the contract were contained in original packages. This, and the other courts have held on several occasions, that the shipping of articles into the state, which are not injurious to public health and good morals, as original articles, and selling them after they had landed in the state is interstate commerce; and that the imposition of any license tax, privilege tax, occupation tax or any law which impaired the right to sell such goods in such condition as they came into the state, interfered with the commerce clause of the Constitution of the United States, and such law, so far as it interfered with the commerce clause, violated the Constitution of the United States and was void.

See:

In re Schoolenberger, 171 U. S. 1.
Wrought Iron Range Co. v. *Campen*, 47 S. E. 658.
Dozier v. *Alabama*, 218 U. S. 124.
Rearick v. *State of Pennsylvania*, 203 U. S. 507.
Stratford v. *Montgomery*, 20 So. Rep. 127.
Caldwell v. *North Carolina*, 187 U. S. 622.
Stockard v. *Morgan*, 185 U. S. 27.

"D."

THE KEEPING OF AN OFFICE IN THE STATE FOR THE PURPOSE OF TRANSACTING BUSINESS OF A FOREIGN CORPORATION, WHICH IS MERELY INCIDENTAL, IS NOT DOING BUSINESS IN THE STATE.

A foreign corporation which is doing a business which is purely incidental to the business which it is organized to perform, namely: the sale of its output, is protected by the commerce clause, and the imposition of a license tax upon the officer or agent or upon the corporation for the maintenance of the building, violates the commerce clause of the federal constitution because it places a burden upon such commerce.

Norfolk & Western Ry. Co. v. *Penn.*, 136 U. S. 114.

McCall v. *California*, 136 U. S. 104.

McNeill v. *Southern Ry. Co.*, 26 Sup. Ct. Rep. 722.

Texas & P. Ry. Co. v. *Davis*, 54 S. W. 381.

So it has been held that the keeping of a building or office within the state, for the purpose of maintaining headquarters or an office for officers and agents of a foreign corporation for the purchase of goods to be shipped outside of the state, is within the protection of the commerce clause of the federal constitution, and any law imposing a burden upon such commerce, however, directly or indirectly, or any restriction imposed upon such commerce, however, directly or indirectly, violates

the commerce clause of the federal constitution and in so far as it violates the clause, is nugatory and void.

"E."

CONSIGNING GOODS TO A DEALER OR REPRESENTATIVE IN ANOTHER STATE, IS NOT DOING BUSINESS IN A FOREIGN STATE.

A corporation of one state may consign goods, for the purpose of sale, to dealers in another state, whereby the dealer may sell and account to the owner or to the manufacturer for the goods at a fixed price. Such transactions have been held to be interstate commerce and not doing business in the state. Such has been the holding in the case of:

Allen v. *Tyson-Jones Buggy Co.*, 40 S. W. 393 (Texas).

Butler Bros. Shoe Co. v. *U. S. Rubber Co.*, 156 U. S. 1; 8th Cir. Ct. of App. (Colo.).

Stockard v. *Morgan*, 185 U. S. 27.

Stratford v. *Montgomery*, 20 So. Rep. 127.

Caldwell v. *North Carolina*, 187 U. S. 622.

Rearick v. *State of Pennnsylvania*, 203 U. S. 507.

Dozier v. *Alabama*, 218 U. S. 124.

"F."

THE BRINGING OF A SUIT BY A CORPORATION IN A FOREIGN STATE IS NOT DOING BUSINESS IN SUCH FOREIGN STATE.

It has been many times urged that under state statutes foreign corporations doing business in the state could not maintain suits or actions in the courts of the state, and in this very case in the Supreme Court of South Dakota, the court held the section above quoted as a law prohibiting the maintaining of a suit in the courts of the state until it had complied with the laws of the state, notwithstanding it admitted that the transaction was an interstate commerce transaction; that the state had the right, under its police power, to prohibit any corporation which had not complied with the laws of the state, to use the courts of said state, and the language in the opinion of the Supreme Court of South Dakota in this case, above quoted, is not very much different from the language of the Supreme Court of Kansas in its opinion in the case of *Wilson-Moline Buggy Company* v. *Hawkins,* 101 Pac. 1009, where the court said:

> "The question here is not the power of the State of Kansas to lay a charge on interstate commerce or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the enforcement of rights through its courts may be availed of. The part of the statute under consideration lays no embargo or burden upon interstate com-

merce; it does not seek to prevent or hamper the transactions of corporations engaged in that business; it does not declare their contracts void or deny them the enforcement of any rights whatever; it merely provides that if they wish to make use of the machinery of the state courts for their own benefit they must do so upon the same terms as other corporate suitors. In this we find no interference with the powers reserved to congress by the federal constitution. * * * The denial of relief by the courts in this instance goes not to the merits of this case; it merely amounts to an adjudication that the plaintiff can not maintain the action at this time. It can no more be said to impair the obligation of the contract sued on than would a judgment dismissing the action for failure of the plaintiff to furnish a satisfactory bond for costs." Citing *Deere* v. *Wyland, supra,* which was followed and affirmed in *Osborne* v. *Shilling,* 74 Kan. 675, 11 A. & E. Annotated cases (n. s.) 319.

"There is, therefore, no force in the contention that the statute impairs the obligation of a contract. How can it be said to abridge the privileges or immunities of any citizen? It makes no distinction between foreign and domestic corporations. All are treated alike. Before either can use the courts to obtain relief in cases of this kind there must be a compliance with the provisions of the statute. The foreign and the domestic corporations are thus afforded equal protection of the laws; and so long as the foreign corporation is given ample opportunity to obtain relief through the courts by complying with the provisions of the statute, it cannot be said that it is deprived of property without due process of law."

It will be noticed from that opinion that the same point is decided exactly as it is decided by

the Supreme Court of South Dakota in the case at bar—that it is a requirement the state has the right to impose and a condition precedent to maintaining a suit. In other words, that it is a police regulation within the power of the state to deny to foreign corporations the right to recover from the citizens of the state for goods sold and delivered by a foreign corporation, even though such goods and transactions are protected by the commerce clause of the Federal constitution.

Nearly all if not every state of the Union has some sort of a statute which practically prohibits a foreign corporation from "doing business" until it has complied with the law. The right to exercise a part of the corporate franchise in the state, namely: to do a part of its authorized business, is made the condition of its complying with the law. In other words, all of the statutes affecting foreign corporations and their right to do business, start out with the provision that, "any foreign corporation desiring to do business within the state" or "any foreign corporation doing business in the state," must do certain things and pay certain fees and make certain reports and make as a condition the failure to do these things, where the corporation is actually doing business in the state, that it can not have the use of the courts.

It is usually by filing a copy of their charter and paying a certain fee to the secretary of state, the appointing of an agent and paying the secretary of state a certain fee for his appointment, registering a copy of their charter in the register's office where

they are supposed to do business and the agent is located, and sometimes the statutes provide additional conditions. But one condition which is practically in all the statutes is that the failure to do the things required where the corporation is doing business in the state, is that it can not have the use of the courts, but we do not understand that that principle can apply where the transaction is interstate commerce and protected by the commerce clause of the Federal constitution. So the statute of South Dakota imposes, as a condition to the transaction of business in the state, the filing and recording of its articles of incorporation, paying the secretary of state a fee for examining and filing, paying the recorder a fee for recording and also designating an agent, and that condition of "doing business" is the basis of the statute.

The Supreme Court of South Dakota, in the case at bar, concedes the transaction to be an interstate commerce transaction, but denies to the plaintiff in error the right to recover for the property which it sold in Iowa to the citizen in South Dakota, and thereby allows the citizen of South Dakota to confiscate the property of the citizen of Iowa without due process of law, and thereby puts a burden upon this interstate commerce transaction, which violates the commerce clause.

We concede that where a corporation is actually exercising a part of its corporate franchise in a foreign state and doing a part of its corporate business in a foreign state, that then it becomes necessary, in order to have the right to maintain

actions in its courts, that it comply with the state's just and reasonable rules and regulations; but where a corporation is doing an interstate commerce business, as has been repeatedly defined by this court, no such right can be demanded by the state and any condition, limitation, or restriction, however great or small, is a burden upon that commerce and such statutes, so far as they affect that commerce are void. Depriving a foreign corporation of the right to enforce its valid interstate contracts in the courts of the state is a burden upon that commerce and must be held to be illegal and void. Such is the effect of the ruling in the case of *International Text Book Co.* v. *Pigg, supra.* Such is the effect of the ruling in many of the cases cited above by this court. Such is the ruling in many of the state courts, as in the cases of:

Finch & Co. v. *Zenith Furnace Co.*, 245 Ill. 586.

Lehigh Portland Cement Co. v. *McLean*, 245 Ill. 326.

Alpena Portland Cement Co. v. *Jenkins & Reynolds Co.*, 244 Ill. 354.

Simpson Fruit Co. v. *A., T. & S. F. Ry. Co.*, 245 Ill. 596.

Havens & Geddes Co. v. *Diamond*, 93 Ill. App. 557.

Cone Export & Commission Co. v. *Poole*, 24 L. R. A. 289.

Faxon & Co. v. *The Lovett Co.*, 60 N. J. Law, 128.

Barse Live Stock Commission Co. v. *The Range Valley Cattle Co.*, 50 Pac. Rep. 630.

Pasteur Vaccine Co. v. *Finkelstein*, 54 S. W. 804.

Woessner v. *Cottam & Co.*, 47 S. W. 678.

Miller v. *Goodman*, 40 S. W. 718.

Christian v. *Am. F. L. & L. Assn.*, 7 So. Rep. 427.

U. S. Gypsum Co. v. *Gleason*, 116 N. W. 238.

Iowa Falls Mfg. Co. v. *Farrar*, 104 N. W. 449.

Thomas Mfg. Co. v. *Knapp*, 112 N. W. 989.

And even in the State of Kansas, upon whose decisions and laws the Supreme Court of South Dakota rely for support of the decision in the case at bar, it has been held that a foreign corporation may maintain a suit on a transaction which might occur while it was doing business in the state, suit being brought after it had withdrawn from the state, or upon a note taken by assignment from some third party and suit maintained in the name of the foreign corporation. Such is the rule in:

Boggs v. *Kelley*, 90 Pac. Rep. 765.

Dempster Mill Mfg. Co. v. *Falkenbery*, 95 Pac. Rep. 1045.

Standard Stock Food Co. v. *Jasper*, 92 Pac. Rep. 1094.

But the Supreme Court of the State of South Dakota, from its opinion in this case, would deny a foreign corporation in any kind of a transaction the right to maintain a suit in the courts of that state.

There is no question in this case that the business transacted is protected by the commerce clause, and the plaintiff is not doing business in the State of South Dakota. The decision of the Supreme Court of South Dakota merely goes to the right to sue in the courts of that state, the right depending upon its taking out a permit and paying therefor, in accordance with the statute we have heretofore quoted. The same question was decided the same way by the Supreme Court of Kansas in the case of *Wilson-Moline Buggy Company* v. *Hawkins*, *supra*, which decision was reversed by this court.

Due Process of Law.

The statute in question, in effect, admits the taking of property without due process of law and violates the fourteenth amendment of the Constitution of the United States.

The statute in question requiring foreign corporations, in order to obtain a permit, to pay a fee to the secretary of state, appoint an agent and keep a place of business in the state, before it can maintain an action in the courts of the state, is taking property without due process of law, in that it takes their money—it imposes liabilities, and it grants no reciprocal benefits, and as a penalty permits its citizens to confiscate property purchased. The per-

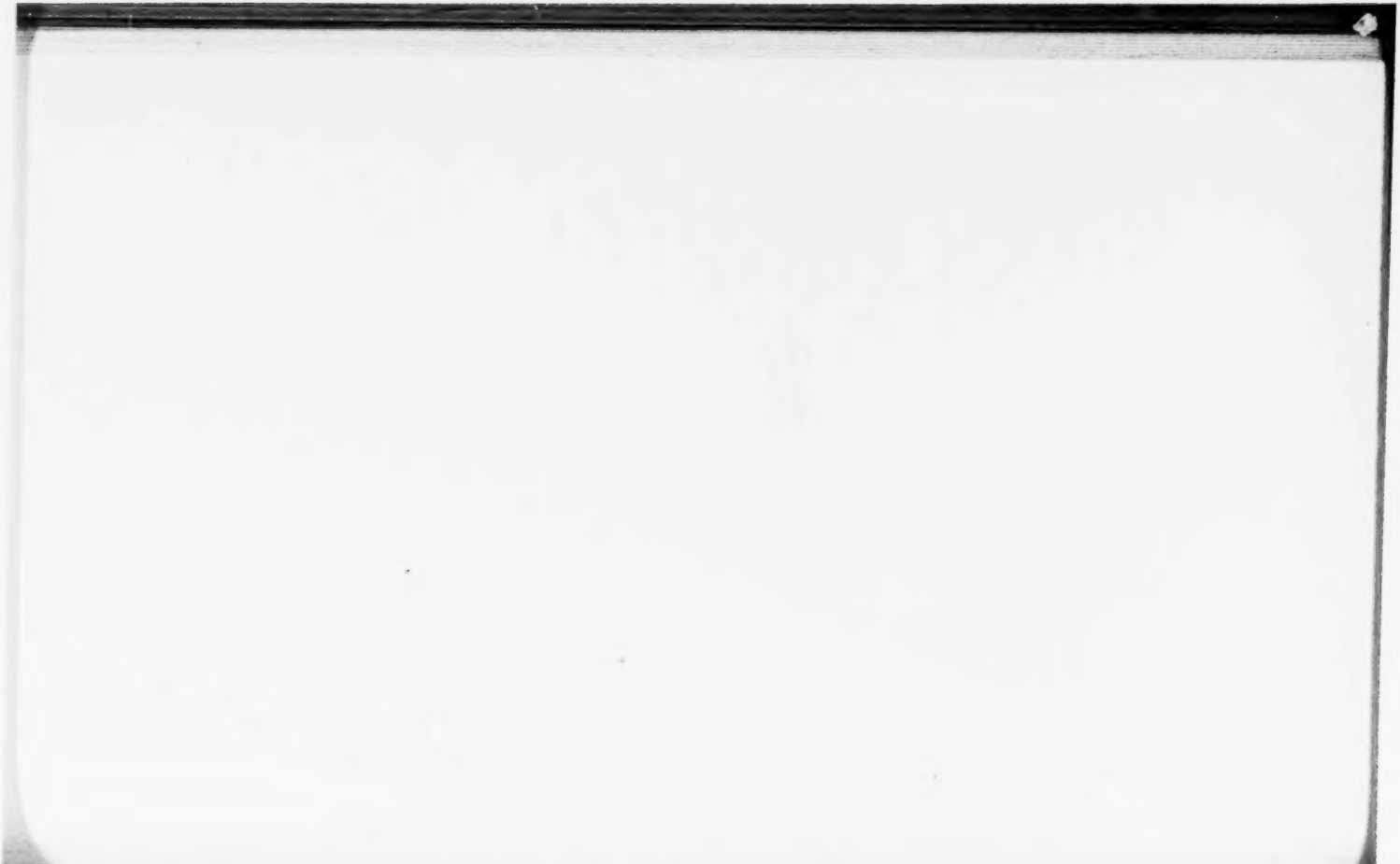
mission by a state to its citizens to buy from a foreign corporation goods which are protected under the commerce clause, and then to deny to the corporation of the foreign state, from whom the citizens have bought the goods, the right to use the machinery of the courts of the state, until it has paid the secretary of state a fee, and until it has appointed an agent, is taking property without due process of law. It permits the citizen of the state to purchase the property from the foreign corporation and hold it without paying for it, because the state says that the foreign corporation cannot have any standing in its courts. The cases which we have heretofore cited fully sustain our position on this proposition. The attempted burden imposed by the State of South Dakota upon the plaintiff in error before permitting it to sue in the courts of the state for the recovery of the purchase price of the goods in question, is taking property without due process of law. We contend that the statute is void as to such transactions and cannot be enforced.

The Statute of South Dakota, as construed by the Supreme Court of that state, clearly violates the constitution, and particularly the commerce clause and the fourteenth amendment, and the judgments of the courts below should be reversed and this cause remanded.

Respectfully submitted,

JOE KIRBY,
C. E. MORE,
Attorneys for Plaintiff in Error.

A. W. BULKLEY,
Of Counsel.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1912.

No. 602 [redacted] 37

SIOUX REMEDY CO.,
Plaintiff in Error.
vs.
F. M. COPE and D. C. COPE,
Defendants in Error.

Error to the Supreme Court of South Dakota.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

JOE KIRBY,
C. E. MORE,
Attorneys for Plaintiff in Error.
A. W. BULKLEY,
Of Counsel.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 692

SIOUX REMEDY CO.,
Plaintiff in Error.
vs.
F. M. COPE and D. C. COPE,
Defendants in Error.

Error to the Supreme Court of South Dakota.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

Defendants in error contend that there is no financial burden imposed upon a foreign corporation. They say on page 14, of their brief:

> "The statute, however, does not impose a tax of any character and does not provide that a contract made within the state by the foreign corporation prior to its compliance with the statute shall be void or absolutely unenforceable, nor does the statute provide that the foreign corporation which acquires property in the state prior to complying with the statute does not secure a title to the property or obtain any rights in it."

The statute does impose a financial burden, chapter 149 of the Laws for 1907 of the State of South Dakota, page 320, section 1. Fixing the fees of the

office of secretary of state, it imposes—first, a fee to the secretary of state of $10 for the filing of the articles, second, a further fee of $10 for a certificate of the appointment of an agent, and third, fees to be paid for the registration on the basis of twenty-five cents per folio of one hundred words.

This is a condition precedent to the right to sue.

The conditions or penalties imposed by the statute are, "that no corporation created or organized under the laws of any other state * * * shall sue or maintain any action at law or otherwise, in any of the courts of this state, etc."

The statute is like the statute of Kansas, section 1522 General Statutes Kansas 1905, which this court has construed repeatedly as a burden upon interstate commerce.

Respectfully submitted,

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Office Supreme Court, U. S.
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JAMES D. MAHER
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

NO. [redacted]37

SIOUX REMEDY COMPANY,
Plaintiff in Error.
v.
F. M. COPE and D. C. COPE,
Defendants in Error.
} Error to the Supreme Court of South Dakota

Brief and Argument for Defendants in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

NO. 692

SIOUX REMEDY COMPANY, *Plaintiff in Error.*
v.
F. M. COPE and D. C. COPE, *Defendants in Error.*
} Error to the Supreme Court of South Dakota

Brief and Argument for Defendants in Error.

STATEMENT OF THE CASE.

The plaintiff in error, a corporation of the state of Iowa, whom we will refer to as the plaintiff as it was the plaintiff in the courts below, sued the defendants in error, residents of the state of South Dakota, whom we will refer to as the defendants as they were defendants in the courts below, to recover a judgment for the purchase price of goods sold to the defendants by the plaintiff. The sale was a transaction in interstate commerce. The title to the goods passed to the defendants upon the delivery of the goods prior to the commencement of the action. The trial court dismissed the action because prior to its commencement the plaintiff had not complied with the foreign corporation laws of the state of South Dakota, Sections

883 and 885 of the Civil Code of the state, which are as follows:

THE STATUTE INVOLVED

§ 883. No corporation created or organized under the laws of any other state or territory shall transact any business within this state, or acquire, hold and dispose of property, real, personal or mixed, within this state, or sue or maintain any action at law or otherwise, in any of the courts of this state, until such corporation shall have filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation, or shall have complied with the provisions of this section; Provided, that the provisions of this section shall not apply to corporations and associations created for religious and charitable purposes only.

§ 885. Such corporation shall appoint an agent who shall reside at some accessible point in this state, duly authorized to accept service of process and upon whom such service of process may be had in any action in which said corporation may be a party, and service upon such agent shall be taken and held as due and personal service upon such corporation. A duly authenticated copy of the appointment of said agent shall be filed and recorded in the office of the secretary of state and register of deeds of the county where such agent resides, and a certified copy thereof by the secretary of state or register of deeds shall be conclusive evidence of the appointment and authority of such agent. *Provided*, that no action shall be commenced or maintained in any of the courts of this state

by such corporation on any contract, agreement or transaction made or entered into in this state, by such corporation, unless such corporation shall have fully complied with the provisions of this article. *Provided, further*, that it shall be unlawful for any person to act within this state as agent or officer of any foreign corporation unless such corporation shall have appointed an agent as hereinbefore provided, and every person so acting as such agent or officer of any such corporation shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten nor more than one hundred dollars and imprisoned in the county jail not less than ten nor more than thirty days, or both such fine and imprisonment at the discretion of the court. That justices of the peace shall have concurrent jurisdiction with the circuit courts to hear and determine any criminal action arising under the provisions of this act.

The judgment of the trial court was affirmed by the Supreme Court of the State of South Dakota.

As will appear from pages 31 and 32 of the Record, and pages 5 and 6 of the brief of counsel for plaintiff, the plaintiff asks for a reversal of the judgment on one or more of the three grounds alleged and argued by counsel, to-wit: that the effect of the statute is, 1, to interfere with interstate commerce, 2, to deny to plaintiff equal privileges and immunities with other citizens of the United States, and 3, to deprive the plaintiff of its property without due process of law. These, in effect, include all the errors assigned and relied on by plaintiff.

THE QUESTIONS INVOLVED.

Practically there is but one question involved in this case to be determined by this Court. It is—Can a state require a foreign corporation to file in the office of its secretary of state a copy of its articles of incorporation and an appointment of an agent resident in the state for the service of process and also file an appointment of such agent in the county in the state in which the agent resides before permitting the corporation to institute or maintain in the courts of the state an action to secure a judgment for the value or purchase price of merchandise sold by the corporation, when the sale was a transaction in interstate commerce?

It is well to bear in mind that there is not involved in this case the rights of a foreign corporation to sell goods in interstate commerce or to use or maintain an action to recover the possession of goods sold or shipped by it in interstate commerce. All that is involved is the right of the corporation to sue or maintain an action for the purchase price of such goods, not an action in conversion for their value, but the ordinary action on account for goods sold.

The latter part of Section 885 of the statute, that is to say, the second *proviso* making it unlawful for any person to act within the state as agent or officer of any foreign corporation unless the corporation shall have appinted a resident agent for service of process, etc., is in no way involved in the case at bar and it is immaterial, therefore, so far as the determination of this case is concerned, whether such second *proviso*

is constitutional or not. The balance of the statute is in no way dependent on the said second *proviso*. That *proviso* would have to fall if the balance of the statute should fall, but the part of the statute preceding the second *proviso* would not have to fall with that *proviso*.

THE INTERSTATE COMMERCE OBJECTION

The Character of the Action

The argument of the plaintiff is necessarily based on the assumption that an action to recover a judgment on a claim for the value or purchase price of merchandise sold in an interestate commerce transaction is a transaction in interstate commerce and also that such a claim is a transaction in interstate commerce or a matter or subject of such commerce. The defendants contend first that such a claim is not a transaction in interstate commerce or a part of a transaction in interstate commerce or a matter or subject of such commerce and second, that even though the Court should be of the opinion that such a claim is a matter or subject of interstate commerce, the statute of the state of South Dakota involved in this case is not such a burden upon, or regulation of commerce between the states as to be in conflict with the provisions of the constitution of the United States.

The contract between the parties was not one of conditional sale or one which gave the plaintiff a lien upon the goods shipped under it by the plaintiff to the defendants. The action was not brought to recover

the possession of the goods or to foreclose a lien of any character upon them. It was brought to recover the purchase or contract price. It is no different in character, so far as the question of interstate commerce is concerned, than if it were an action brought to secure a judgment on a bill of exchange which had been drawn by the plaintiff upon the defendants for the amount of the purchase price of the goods, which bill of exchange the defendants had accepted but had failed to pay. Such a bill of exchange would be, and therefore a claim of the character sued upon in this action is, merely an incident of an interstate commerce transaction and is not such a transaction itself or a part of such a transaction. Such a claim or bill of exchange is not an instrumentality of commerce. It does not represent the goods sold in interstate commerce as would a bill of lading covering such goods. It does not confer any title to the goods, or right to their possession. It is a mere incident of a transaction in interstate commerce. It is subject to the control, therefore, of the state in which it is held or in which the owner of it may desire to enforce it by bringing a suit to recover a judgment upon it. Such a claim, or bill of exchange, represents, or perhaps is, merely a contractual relation between the parties to it. The manufacturing of goods sold afterwards in interstate commerce, even if such goods are manufactured for the express purpose of being sold in interstate commerce, is not interstate commerce, nor is the maintaining of an action to secure a judgment for the sale price of such goods, sold in interstate commerce, interstate commerce. It is merely the goods, or some

thing such as a bill of lading representing them which gives the owner of it the right to the possession of them, or the manner of the sale or shipment of them in interstate commerce which is an interstate commerce transaction and, therefore, within the provision of the commerce clause of the Constitution of the United States and the control of Congress.

After the shipment of goods sold in interstate commerce, in case they were lawfully sold and shipped, is completed and they have become the property of the purchaser they lose what we may call their interstate commerce character and become subject in all respects to the control of the state and thereafter rights with respect to them are only such as are given by the laws of the state. Certainly, therefore, a claim or account for the purchase price of the goods after the goods have been so sold and shipped and have become the property of the purchaser can stand in no better position with respect to what we may term the protection of the interstate commerce clause of the Constitution of the United States or for that matter any other provision of that Constitution than can the goods themselves.

We quote the following from Section 8, at page 15, of Judson on Interstate Commerce. (2nd Ed.)

> "§ 8 WHAT IS NOT COMMERCE.—While commerce is more than traffic and includes commercial intercourse and the transmission of intelligence, it does not include the contractual relations between citizens of different states, which are incidental or even in one sense are essential to interstate commercial intercourse. The dis-

tinction may be illustrated by a bill of lading and a bill of exchange. A bill of lading upon an interstate or foreign shipment represents the property shipped, and in the case of an interstate shipment is beyond the taxing power of a state, and in the case of a foreign shipment a tax upon a bill of lading is a tax upon exports, and therefore beyond the taxing power of either the state or federal government. On the other hand, a bill of exchange, whether drawn on an interstate shipment or a foreign shipment, is an incident of such commerce and not a part of it. It follows, therefore, that a broker dealing in foreign bills of exchange is not engaged in commerce, but in supplying the instrumentalities of commerce, and a state tax upon money and exchange brokers is not void as a regulation of commerce.

The business of a manufacturing company, although the manufactured product is sold by the company in other states and in foreign countries, is not interstate commerce. Commerce succeeds manufacture, and is not a part of it, and the relation of the manufacturer, in such a case, to interstate and foreign commerce is incidental and indirect, and the business therefore is subject only to state control."

As stated in the opinion of the Supreme Court of Alabama in the case of *Nelms* v. *Edinburgh American Land Mortgage Company, Ltd.*, 92 Ala. 157, 9 So. 141, 142.

> "Money is not a commodity of barter and sale, or to be put up and sold after being shipped, and the loaning of money by foreign corporations, engaged in that business, is not a matter of interstate commerce, and may be subjected to the con-

ditions imposed by the Constitution." (The constitution referred to in this quotation is that of the state of Alabama, some provisions of which were involved in the case.)

The claim of the plaintiff against the defendants in the case at bar is not a claim for a specific article or for something which would entitle the plaintiff to a specific article which was sold in interstate commerce, but is merely a claim for money. Any judgment which might be recovered on the claim would not entitle the plaintiff to any specific property, but would merely give the plaintiff the right to force through an execution, the collection or payment of the amount of the judgment if property of the defendants could be found, which would be liable to a levy and sale under the execution. The claim of the plaintiff, therefore, is merely a claim for money and in no way differs from the claim of the loaner of money against the borrower. We submit that it cannot be successfully contended that a mere claim for money, even though it may be based on an interstate commerce transaction, is interstate commerce.

The distinction between specific articles which are manufactured or sold or shipped in such a way as to become interstate commerce and a claim for the money value or selling price of such articles is, we submit, clear and easily drawn from the decisions of this court.

The Record shows that the contract between the parties to this case set forth in the answer of the defendants, was executed in the state of South Dakota

(Record, p. 11). In the case of *Paul* v. *Virginia*, 8 Wall 168, in holding that the business of insurance was not interstate commerce, it will be remembered that the court, at page 181, used the following language:

> "The recognition of this (the corporation's) existence even by other states, and the enforcement of its contracts made therein, depend wholly upon the comity of those states, a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

Clearly, therefore, it is in the power of the state of South Dakota to exact from the plaintiff the compliance with the reasonable requirements of its foreign corporation laws before according to the plaintiff the use of its courts to enforce its contracts entered into within the state of South Dakota or to secure a judgment for the value of goods which may have been sold and shipped in interstate commerce under such contracts.

In *Paul* v. *Virginia*, *supra*, the court, at page 183, says:

> "These contracts (insurance contracts) are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something of existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Of course if the goods purchased in Virginia by the citizen of New York were to be shipped under the terms of the sale from Virginia to New York, such goods would be a part of the commerce between the states of Virginia and New York, but a right of action on the contract for the sale of such goods to recover a judgment for their purchase price would not be a portion of such commerce.

So the contract between the parties to the case at bar and any right of action based on or growing out of such contract is not, if we may apply the language

from the quotation last made, a subject of trade or barter, which has an existence and value independent of the parties to it and is not a commodity to be shipped or forwarded from one state to another and then put up for sale.

To the same effect are the cases of *Hooper* v. *California*, 155, U. S. 648, in which this Court in holding that the business of marine insurance was not interstate commerce, strongly affirmed the case of *Paul* v. *Virginia*, *supra*, and *Nathan* v. *Louisiana*, 8 How. 73, in which the court held that a broker dealing in foreign bills of exchange is not engaged in commerce, but in supplying the instrumentalities of commerce, and that, therefore, a state tax upon money and exchange brokers is not void for repugnance to the constitutional power of Congress to regulate commerce and is valid notwithstanding the fact that foreign bills of exchange are instruments of commerce.

CASES CHIEFLY RELIED UPON BY THE PLAINTIFF.

Though counsel for the plaintiff cite many cases in their brief and seek to have the judgment reversed on the various grounds argued by them, they state (page 13 of Brief and Argument for plaintiff in error) that the case is controlled by the cases of the *International Text-book Company* v. *Pigg*, 217 U. S. 91; *Wilson-Moline Buggy Company* v. *Hawkins*, 223 U. S. 713; *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Company*, 216 U. S. 146; *Southern Railway Company* v. *Greene*, 216

U. S. 400; and *Atchison, Topeka & Santa Fe Railway Company* v. *O'Connor*, 223 U. S. 280.

To these cases may be properly added, as they are of the same class, though not cited by the plaintiff, the following: *International Text-book Company* v. *Peterson*, 218 U. S. 664; *International Text-book Company* v. *Lynch*, 218 U. S. 664; and *Buck Stove and Range Company* v. *Vickers*, 226 U. S. 205.

In the opinions in these cases are found the latest views and holdings of this court on the questions decided by them. We contend that each of these cases is to be distinguished from the case at bar and that none of them decides the questions involved in this case. In fact, as we read and understand some of them this court has taken the precaution to exclude from them the question now before it in this case. The questions decided by this court in those cases were largely, if not wholly, either questions which involved the taxing powers of the state or questions which required the court to determine whether the transactions involved in them were in interstate commerce. In some of these cases there was raised the right of the foreign corporation to maintain an action in the courts of the state, before complying with the foreign corporation laws of the state, on a contract made in interstate commerce but in such cases that particular question was not decided because the particular state statute involved prohibiting the corporation from maintaining such an action until it had complied with the statute (a) required in effect a payment of a tax of the character which the state was without power

to impose, or (b) denied to the corporation the privilege of enforcing the contract in the courts of the state unless the statute had been complied with prior to the time the contract was made or (c) required the corporation to make a statement of matters pertaining to its business outside of the state, over which the state had and could have no control and the prohibition upon the maintaining of an action before complying with the statute was so bound up or interwoven with the other provisions of the statute which were held invalid because in conflict with some provision of the Constitution of the United States that the entire statute had to fall. The statute of the state of South Dakota is not such a statute.

The South Dakota statute, Section 883 of the Civil Code, provides that the foreign corporation shall not (1) transact any business within the state, or (2) acquire, hold or dispose of property within the state, or (3) sue or maintain an action in any of the courts of the state, until it has filed in the office of the secretary of state, a copy of its charter or articles of incorporation. The statute, however, does not impose a tax of any character and does not provide that a contract made within the state by the foreign corporation prior to its compliance with the statute shall be void or absolutely unenforceable, nor does the statute provide that the foreign corporation which acquires property in the state prior to complying with the statute does not secure a title to the property or obtain any rights in it. No penalty is imposed on the non-complying corporation which transacts business within the

state or acquires, holds or disposes of property within the state. The condition, however, (as distinguished from a penalty) is imposed by the statute that the corporation cannot sue or maintain an action in any of the courts of the state until it complies with the statute. The statute does not call for the filing by the corporation of a statement of any character with reference to its business or its capital stock or of information which could be used as a basis for taxation. The expense of complying with the statute is admittedly comparatively trifling. Said Section 883 is so worded that it in effect treats of three matters, to-wit: First, the transaction of business within the state, second, the acquiring, holding and disposing of property within the state, and third, the suing and maintaining of an action in the courts of the state. Each of these three matters is separate and distinct from the others and not dependent upon the others and if the statute, so far as anyone of them is concerned, should for any reason be held unconstitutional the other matters are not so inseparately bound up with the one on account of which the statute might be held unconstitutional that the statute would fall as to them also.

In the case of the *International Text Book Company* v. *Pigg*, 217 U. S. 91, the statute of the state of Kansas in question, Section 1283 of the General Statutes of that state of 1901, is copied at page 102 of the opinion so far as the foreign corporation features of it are concerned. As appears from pages 101 and 102 of the opinion, the foreign corporation laws of Kansas provide that the corporation shall make an

application to the state Charter Board for permission to engage in business in the state as a foreign corporation, must accompany the application by a fee of twenty-five dollars ($25.00), must file in the office of the secretary of state its irrevocable consent that process against it may be served upon that officer, must submit to a special inquiry by the Charter Board in reference to its solvency if the board so elects, and must pay to the state treasurer a sum equal to a specified per cent. of its capital stock. The validity of the foregoing requirements, however, was not, as we understand the decision, considered or passed upon by the court. The court considered only the provisions of said Section 1283 which require the corporation on or before the first day of August in each year to prepare and deliver to the secretary of state a detailed statement of its condition on the 30th day of June next preceding, showing (1) its authorized capital stock, (2) its paid up capital stock, (3) the par value and the market value per share of its stock, (4) a complete and detailed statement of its assets and liabilities, (5) a full and complete list of its stockholders with the post office address of each and the number of shares held and paid for by each, and (6), the names and post office addresses of its officers, trustees or directors, and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held, and the section provided further, that the failure to file such statement shall work a forfeiture of the right of the corporation to do business in the state and that no action shall be maintained or recovery had in any of the courts of the state

by the corporation without first obtaining a certificate of the secretary of state that the statement called for by said Section 1283 had been properly made.

The court held that the requirement from the foreign corporation of the statement called for by said Section 1283 is a regulation of interstate commerce and directly burdens such commerce in that the effect of the requirements is practically the same as if a formal license were required as a condition precedent to the right of the corporation to do an interstate commerce business in Kansas; that said Section 1283, looking at the object for which it was enacted, must be regarded as an entirety and that as the corporation could not be required to file the statement called for by the section before transacting interstate commerce business in the state, the further provision of the section that no action should be maintained by the corporation in the courts of the state without first obtaining the certificate of the secretary of state that the said statement had been properly made, was meaningless when standing alone and that, therefore, the entire section must fall, the clause of the section relating to suits being meaningless without reference to the other provisions of the section.

No statement of the character called for by said Section 1283 of the General Statutes of Kansas is required by the South Dakota statute.

Furthermore, this court in its opinion in the *Pigg Case* says at page 112:

> "How far a corporation of one state is entitled to claim in another state, where it is doing

> business, equality of treatment with individual citizens in respect to the right to sue and defend in the courts is a question which the exigencies of this case do not require to be definitely decided."

This statement of course, has reference to the Fourteenth Amendment to the Constitution of the United States, which amendment we will discuss later in this brief.

We quote the following from the concluding paragraph of the opinion in this the *Pigg Case* on page 114:

> "It results that as the part of Section 1283 which relates to the statement to be filed with the secretary is unconstitutional, and as the clause in the same section, relating to suits in the state court, is so dependent upon and connected with that part as to be meaningless when standing alone, the section must be held in-operative in all its parts as not being in the way of the enforcement in any state court of competent jurisdiction of the plaintiff's right to a judgment against the defendant for the amount conceded to be due from him to the Text-book Company under his contract."

It will be observed, therefore, that in its opinion in the case of the *International Text Book Company* v. *Pigg*, *supra*, this court has not passed upon a statute of a state prohibiting the maintenance of a suit in the state court by a foreign corporation until the corporation has complied with some condition provided by the statute when such statute or such provision of it is not so bound up with other statutes of the state or other provisions of the particular statute that it is not

"meaningless when standing alone" and when it can, if necessary, be segregated from the other provisions of the laws of the state or the particular statute involved and given effect and enforced by itself without reference to such other provisions.

The case of the *Wilson-Moline Buggy Company* v. *Hawkins*, 223 U. S., 713, in which this court without an opinion and basing its decision on the case of the *International Text Book Company* v. *Pigg*, *supra*, reversed the judgment of the Supreme Court of Kansas reported in 80 Kans. 117, 101 Pac. 1009, is to be distinguished from the case at bar in the same manner that the case of the *International Text Book Company* v. *Pigg* is to be distinguished. Upon a comparison of the two cases it will be found that there is no particular difference between them so far as the facts involved in them and the questions of law decided by them with respect to the case at bar are concerned.

The cases of the *Western Union Telegraph Company* v. *Kansas*, 216 U. S., 1; *Pullman Company* v. *Kansas*, 216 U. S., 26; *Ludwig* v. *Western Union Telegraph Company*, 216 U. S., 146; *Southern Railway Company* v. *Greene*, 216 U. S., 400; and *Atchison, Topeka & Santa Fe Railway Company* v. *O'Connor*, 223 U. S., 280, relied on by counsel for plaintiff, are all cases involving the power of a state to tax a foreign corporation. Practically no other question was involved in them and no other question was decided by them. The South Dakota statute is not a taxation statute. These cases are analyzed and distinguished in the recent opinion of this court in the case of the

Baltic Mining Company v. *Massachusetts*, 231 U. S., 68, at page 85, from which (and also from the opinions in the cases) it appears that each of the corporations was transacting both intrastate business and interstate business with the same instrumentalities and agencies in the same places in the states in which the cases arose. The right of the foreign corporations who are parties to those cases to maintain actions in the courts of the states, was in no way involved. Even if the South Dakota statute were intended as a taxation statute and should be attacked on the ground that it discriminates against the foreign corporation in favor of the domestic corporation, no compliance with the statute being required on the part of domestic corporations, the statute would not necessarily be unconstitutional in view of the following statement of this court at page 88 in its opinion in the case of the *Baltic Mining Company* v. *Massachusetts*, *supra*. "Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a state to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations." The question for determination in the case at bar in no way involves the power of a state to prevent a foreign corporation from transacting business within its borders or to declare invalid contracts made by the corporation within the state, but has to do solely with the power of the state to fix the terms upon which a foreign corporation may use its courts.

In the case of the *International Text-book Com-*

pany v. *Peterson*, 218 U. S., 664, the judgment of the Supreme Court of Wisconsin, 133 Wis., 302, 113, N.W., 730, was reversed, and in the case of the *International Text-book Company* v. *Lynch*, 218 U. S., 664, the judgment of the Supreme Court of the state of Vermont, 81 Vt., 101, 69 Atl., 541 was reversed. The facts are not stated in the opinion of this court which covers both cases. The opinion, which is a *Per Curiam* opinion, merely states that substantially the same question of Federal law was involved in the cases that arose in *International Text Book Company* v. *Pigg*, *supra*, and that in view of the pleadings and the concealed facts in the *Peterson and Lynch cases*, the judgment in each of them was reversed on the authority of the *Pigg Case*.

The statute of the state of Wisconsin involved in the *Peterson Case* is not set forth in the opinion of the Supreme Court of Wisconsin, but by reference to such statute, Section 1770b, of the statutes of that state of 1898, as amended, which was the statute before the court, it appears that a foreign corporation in addition to filing in the office of the secretary of state of the state of Wisconsin a certified copy of its articles of incorporation and all amendments thereto must file with such secretary of state a statement showing among other things, (a) the name of the corporation and the location of its principal office without the state, (b) the names and addresses of the officers of the corporation, (c) the amount of the capital stock paid in money, property or services, (d) the proportion of the capital stock of the corporation represented

in the state of Wisconsin, (e) appoint the secretary of state of the state of Wisconsin its attorney for the service of process, such appointment to be irrevocable so long as any liability of the corporation remains outstanding in the state, (f) when the corporation was authorized to do business in the state wherein incorporated and whether now so authorized, and (g) comply with all of the laws of the state of Wisconsin with regard to foreign corporations, and the statute further provides that the foreign corporation shall annually file with the secretary of state of the state of Wisconsin a report as of the first day of January giving substantially the same information called for by the statement above described and the statute contains other provisions more or less stringent in character, including the declaring void on behalf of the corporation and its assigns, but enforcible against it and them, contracts made by or on behalf of the corporation affecting its personal liability or relating to property within the state before the compliance by the corporation with the law. The right of the foreign corporation to maintain an action in the courts of the state was not involved to any greater extent than in the *Pigg Case*.

It is apparent, therefore, that the Wisconsin statute is not different, so far as the questions under consideration are involved, from the Kansas statute. Many of the matters, a statement of which is called for by the Wisconsin statute, are not within the control of state legislation so far as the foreign corporation is concerned. The *Peterson Case*, therefore, in

no way differs from the *Pigg Case* and is to be distinguished in like manner.

From the opinion of the Supreme Court of Vermont in the *Lynch Case* 81 Vt., 101, 69 Atl., 541, *supra*, it appears that a foreign corporation is required to pay an annual license tax and obtain a certificate from the secretary of state. The International Text-book Company had transacted business in the state of Vermont without paying such license tax. The business was like the business transacted in the state of Kansas and was interstate commerce. The court was required to pass upon the constitutionality of Section 55 of Act 20 of the Acts of the State of Vermont of 1902, which section was as follows:

> "If any corporation or association organized under the laws of this state, or any corporation or association organized under the laws of any state or government other than Vermont and doing business herein, shall not have paid the annual license tax required of such corporation or association, on or before the first day of May, in each year, such corporation or association shall not maintain an action in this state subsequent to such date, unless prior to the making of such contract it shall have paid its annual license tax. This prohibition shall also apply to any assignee of such corporation or association and to any person claiming under such assignee, corporation or association, or under either of them."

It will be noted that this section prohibits absolutely the maintaining of an action in the courts of Vermont on an interstate commerce contract made in Vermont by a foreign corporation unless *prior* to the

making of the contract the corporation had paid the annual license tax required by the laws of Vermont. The section in effect declares void and unenforcible in the courts of Vermont, a contract made in that state by a foreign corporation which had not complied with the foreign corporation laws of the state even though the corporation, after making the contract, should comply with such laws. The South Dakota statute is not at all of this character. In the Vermont statute as in the Kansas and Wisconsin statutes the provision with reference to the maintaining of suits by the foreign corporation in the courts of the state is so inextricably bound up with the other provisions of the statute that it would be meaningless standing alone and the other provisions of the statute falling the provision with reference to the maintaining of suits has to fall with them.

In the case of the *Buck Stove and Range Company* v. *Vickers* 226, U. S., 205, the same statute of the state of Kansas was involved and the facts were substantially the same as in the case of the *International Text-book Company* v. *Pigg, supra*, and the case is to be distinguished in the same manner as is the *Pigg Case*.

THE EQUAL PRIVILEGES AND IMMUNITIES OBJECTION.

The South Dakota statute is attacked by the plaintiff in error on the alleged ground that the enforcement of it denies to plaintiff in error equal privileges and immunities with other citizens of the United States. The plaintiff in error therefore invokes the

protection of the second section of Article Four of the Constitution of the United States which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states and of that provision of section one of the Fourteenth Amendment to the Constitution which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

So far as this particular objection is concerned it will suffice to say that this court after giving the objection, in the case of a foreign corporation exhaustive consideration in the case of *Blake* v. *McClung*, 172 U. S. 239 held (at page 259 of the opinion) that a corporation is not a citizen within the meaning of those constitutional provisions.

THE EQUAL PROTECTION OF THE LAWS OBJECTION.

Though counsel for plaintiff in error have not attacked the South Dakota statute on the ground that it is in conflict with that provision of section one of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws, it may be suggested that the statute is unconstitutional for that reason.

This question was also considered by this court in the case of *Blake* v. *McClung*, *supra*, and the court at page 261 of the opinion held that a corporation not created by Tennessee, nor doing business there under

conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the equal protection of the laws provision of the Fourteenth Amendment within the jurisdiction of the State of Tennessee and that the corporation not being within the jurisdiction of that state was not therefore within the protection of that provision of the Fourteenth Amendment. In the case at bar the plaintiff in error was not within the Jurisdiction of the State of South Dakota.

THE DUE PROCESS OF LAWS OBJECTION.

Of the errors specified and argued by plaintiff in error there remains to be considered the objection that the South Dakota statute is in conflict with that clause of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deprive any person of property without due process of law.

This court so far as our study of its opinions discloses has never been required to determine whether the enforcement of a statute such as that of the State of South Dakota involved in the case at bar deprives a foreign corporation of property without due process of law. This court has been careful not to attempt to give, and thereby to some extent perhaps bind itself in so giving an all-embracing definitive definition of due process of law as those words are used in the Fourteenth Amendment. Each case is to be determined from the facts presented by it. In treating this constitutional provision, Professor McGehee in

his work on Due Process of Law under the Federal Constitution well says at page 56 that

> "The court has preferred the wiser and more conservative course of ascertaining the intent and application of the phrase 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (Citing *Davidson* v. *New Orleans*, 96 U. S. 97; *Holden* v. *Hardy*, 169 U. S. 366; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 563.) But the reasoning of the cases must recognize some test, however vague, and this test is declared to lie in the fact that the provision questioned does not involve an infringement of 'certain fundamental rights, which that system of jurisprudence, of which ours is a derivative, has always recognized;' (Citing *Brown* v. *Levee Comrs.*, 50 Miss. 468, quoted in *Hurtado* v. *California*, 110 U. S. 536.) or it must observe 'those general rules established in our system of jurisprudence for the security of private rights;' (Citing *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 709.) or 'the act must not overstep the inherent and reserved powers of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' (Citing *Hurtado* v. *California*, 110 U. S. 535.)

Unless the plaintiff, a foreign corporation, can establish as a matter of fact and law that it has a "fundamental right" to maintain in the courts of the state of South Dakota an action to recover of the defendants a judgment for the purchase price of the goods sold under the contract set forth in the answer

of the defendants when the plaintiff has not complied with the provisions of the South Dakota statute, it cannot be successfully contended that a South Dakota court in dismissing an action deprives the plaintiff of any property without due process of law. The plaintiff would not have been denied the privilege of maintaining the action or have been deprived of its claim had it prior to the commencement of the action complied with the statute. The expense of such compliance would have been comparatively trifling and not a burden upon the plaintiff or a burdensome regulation of its business.

THE STATUTE IS VALID THOUGH IT MAY AFFECT INTER-STATE COMMERCE.

Counsel for plaintiff in error contend that the South Dakota statute deprives a foreign corporation of the right to enforce its valid interstate contracts in the courts of the state and is therefore a burden upon such commerce. If the case at bar were a case to enforce an interstate commerce contract, which it is not, it being as hereinbefore shown merely an action to secure a judgment for the purchase price of goods sold in interstate commerce, it is perhaps true that the effect of the statute, if the corporation should not comply with the statute before commencing a suit to enforce a valid interstate contract, would be as counsel contend. However, this would not be the effect of the statute if the corporation should comply with it before commencing such a suit. The expense of complying with the statute would be comparatively trifling and, as hereinbefore shown, the statute does not re-

quire the foreign corporation to make any showing with reference to its capital stock, its assets, its liabilities or its business, as do the statutes of Kansas and Wisconsin hereinbefore considered. It does not even require the corporation to consent that the appointment of an agent resident in the state for the service of process shall be irrevocable. The corporation, therefore, could revoke the appointment at any time after the termination of the action in order to institute which in the courts of the state it had complied with the statute. Though the expense of complying with the statute if charged by the corporation against the amount it might collect on a judgment recovered in the action, might have the effect of lessening to that extent the profit on the sale of the goods sold, this would not be a burden upon or a regulation of the sale of the goods in interstate commerce within the purview of the commerce clause of the Constitution. The statute was not enacted for that purpose.

Though, the statute may affect interstate commerce it is not a regulation of it. It does not declare invalid a contract made in inter-state commerce. It merely, so far as the plaintiff in the case at bar is concerned and that of course is all that is involved in this case, imposes the condition upon the plaintiff in error that before applying to the courts of the state to secure a judgment for the value of goods sold in inter-state commerce it comply with the statute.

The expense of complying with the law is not an imposition upon the right of the corporation to make a contract for the sale of goods nor upon the right of

the corporation to transport or ship the goods in inter-state commerce.

In so far as the statute is a burden upon a foreign corporation it is not a burden imposed for the purpose of interfering with or regulating inter-state commerce.

It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution.

State Tax on Railway Gross Receipts, 15 Wall, 284, 293.

Ashley v. *Ryan* 153 U. S. 436, 444.

It was well said by this court in the case of *Hall* v. *De Cuir* 95 U. S. 485, that

> "There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution'", page 487.

> "The line which separates the powers of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not infrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be lo-

cated. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." Page 488.

In the case of *Blake* v. *McClung* 172 U. S. 239 at page 256 this court says

> "We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states* * * * * * * * The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States by and for whom the Government of the Union was ordained and established."

It will be remembered that a corporation is not a citizen within the meaning in which that word is used

in the last quotation, *Blake* v. *McClung*, *supra*, at page 259.

The right of a state to require a foreign corporation which may have complied with the foregn corporation laws of the state to give a bond for costs before instituting a action in the courts of the state is undoubted. Such a regulation by the state of procedure in its courts is unquestionably within its power even though a bond for costs may not be required of a domestic corporation. It is difficult to understand, therefore, why the state cannot in like manner require the foreign corporation to file a copy of its articles or charter and an appointment of an agent for the service of process as a condition to its being permitted to use the courts of the state.

In the case of *Chambers* v *Baltimore and Ohio Railroad Company*, 207 U. S. 142, this court says,

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and with-

held from the citizens of other states is void, because in conflict with the supreme law of the land." Page 148.

As stated above with respect to the next preceding quotation that from *Blake* v. *McClung*, *supra*, a corporation is not a citizen within the meaning of the last quotation. Of course if the foreign corporation should comply with the foreign corporation laws of the state it would then be entitled to institute and maintain actions in the courts of the state of the same character that domestic corporations could institute and maintain, as otherwise the foreign corporation having so complied with the foreign corporation laws of the state and thereby having become within the jurisdiction of the state would be denied the equal protection of the laws. It follows, therefore, that the state of South Dakota has the right to refuse the use of its courts to hear and determine a controversy which a foreign corporation while refusing to comply with its foreign corporation statute, desires to have determined by its courts unless possibly so far as the questions in the case at bar are concerned such controversies should be *directly* involved in inter-state commerce, that is to say, goods sold in inter-state commerce or the transportation of such goods or some instrumentality of such commerce. An ordinary claim or book account for the purchase price of goods sold in inter-state commerce is not inter-state commerce, does not represent such goods, has nothing to do with the transportation of such goods in inter-state commerce and is not an instrumentality of such commerce.

We submit that in the opinion of this court in the case of *Diamond Glue Company* v. *United States Glue Company*, 187 U. S. 611, is found sufficient authority to sustain the South Dakota Statute. The statute of Wisconsin involved in that case was one which forbade a foreign corporation to transact business in the state until it had filed a copy of its charter with the secretary of state and such secretary had been appointed the attorney of the corporation for the service of process. A fee of $25 was to be paid for filing the charter. The law provided further that every contract made by the corporation affecting its personal liability or relating to property within the state before compliance with the law should be void on its behalf but should be enforceable against it. The question of inter-state commerce was involved. The court at page 615 of the opinion says:

> "We shall advert to parallel considerations in connection with the alleged interference with commerce between the states. The prohibition in this case is not absolute but is only conditional on the failure to deposit a copy of the plaintiff's charter and to pay a small fee. It is merely incident to a regulation which, but for the contract, unquestionably would be proper, and which is familiar in the laws of the states. It can be avoided by compliance with the regulation. We are not prepared to say that the regulation would be unreasonable or invalid as to such a contract as this, even if enacted after the contract was made."

And again in the same opinion the court says: at page 616.

> "It is said that the contract in suit, as car-

ried out, was concerned in part with interstate commerce, and therefore was free from the operation of the Wisconsin statute. The portion of the contract that called for the carrying on of business in Wisconsin was not so concerned, and the inseparable provisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside the State or not. The foundation of the commerce outside the State was doing business within it. The superintendence and manufacture had to come before the sale. The small requirements of this act before allowing the plaintiff to do business in the State, if good as to that business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13; *Hopkins* v. *United States*, 171 U. S. 578, 592, 594. The interference with the regulation of commerce between the States is more remote than when a bridge between two States, or the franchise of a domestic corporation created with the intent to carry on such commerce, is taxed. See *Henderson Bridge Co.* v. *Henderson City*, 173, U. S. 592, 622, 623; *Central Pacific Railroad Co.* v. *California*, 162 U. S. 91, 119, 125, 126. In modern societies every part is related so organically to every other, that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be

made. See further *Kidd* v. *Pearson*, 128 U. S. 1, 21, *Coe* v. *Errol*, 116 U. S. 517, 525, 527; *Treadway* v. *Riley*, 32 Nebraska, 495."

It may be suggested that the decision of this court in *Diamond Glue Co.* v. *United States Glue Co. supra* from which the last quotation is made was in effect reversed by the decision of the court in the case of the *International Text-book Company* v. *Peterson* 218 U. S. 664 *supra*. In the *Peterson Case*, however, as we have shown, the decision was based not on the fact that the Wisconsin statute required the foreign corporation to file a copy of its charter and an appointment of the secretary of state as its agent for the service of process and pay a fee of $25 for the filing but because the statute contained the further requirement that the corporation file a statement with reference to its capital stock, its officers, etc. Such further requirement was not involved in the *Diamond Glue Company Case*. The portion of the statute that was involved in the *Diamond Glue Company Case* is substantially identical with the South Dakota statute and the expense of complying with the South Dakota statute is practically $25 as in the *Diamond Glue Company Case*. If, as stated by the court in that case, the Wisconsin statute considered and involved in the case is an interference with the regulation of commerce between the states more remote than when a bridge between two states is taxed, which taxation of course is lawful though the bridge is an instrumentality of interstate commerce, how can it be successfully contended that the South Dakota statute with its limited and reasonable requirements, not so harsh or burden-

some as those portions of the Wisconsin statute considered and involved in the Glue Company case, is invalid because it is a regulation of inter-state commerce?

The constitutionality of such a statute as that of the state of South Dakota, but more stringent in its provisions, has been practically recognized by this court in the case of *David Lupton's Sons Company* v. *Automobile Club of America*, 225 U. S. 489. The foreign corporation law of the state of New York involved in that case provided (p. 495) "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made for it in this state unless prior to the making of such contract it shall have procured such certificate." (The certificate referred to was one which the law required to be obtained from the secretary of state showing that the foreign corporation had complied with the provisions of the law by filing a copy of its articles, etc.) The New York statute is more stringent, therefore, than the South Dakota statute in that compliance with the statute must precede the making of the contract, whereas, under the South Dakota statute the contract may be made first, the compliance with the statute merely being required before commencing the suit. The contract sued on in that case was made in an interstate commerce transaction The action was brought in the United States Circuit Court and defended on the ground that it could not be maintained because the plaintiff had not complied with the statute prior to making the contract. It ap-

peared, however, that the highest court of the state of New York had held that the statute did not make such a contract void, but merely imposed a disability to sue on it in the courts of the state of New York. The United States Circuit Court, therefore, had jurisdiction, it not being a court of the state of New York and that state having no jurisdiction over it. However, after quoting the statute (at page 497), this court quotes the following from the opinion of Mr. Justice Willard Bartlett in the case of *Mahar* v. *Harrington Park Villa Sites*, 204 N. Y. 231.

> "This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint, but in my opinion it is not operative to wholly invalidate the contract."

In the *David Lupton's Sons Case*, at page 499, in discussing the case of *Allen* v. *Alleghany Company*, 196 U. S. 458, this court said

> "In dismissing the writ of error to review that judgment (*Allen* v. *Alleghany Co.*, 196 U. S. 458, 465) this court commented upon the decision of the New York court in the case of the *Neuchatel Asphalte Co.* v. *The Mayor*, 155 N. Y. 373, which arose under the statute in an earlier form, the section (15) of the General Corporation Law then providing that the foreign corporation should not maintain 'any action in this State upon any contract made by it in this State until it shall have procured such certificate.' This court said: 'The Court of Appeals in that case held that the purpose of the act was not to avoid contracts, but to provide effective super-

vision and control of the business carried on by foreign corporations; that no penalty for non-compliance was provided, except the suspension of civil remedies in that State, and none others would be implied. This corresponds with our rulings upon similar questions. *Fritts* v. *Palmer*, 132 U. S. 282."

It will be noted that the statute of the state of New York described in that quotation is substantially identical with the statute of the state of South Dakota in that the provision is that the foreign corporation shall not maintain an action on the contract until the statute has been complied with, it not being necessary that compliance with the statute have preceded the making of the contract.

We also cite in this connection the case of *Johnson* v. *New York Breweries Company, Limited*, 178 Fed. 513, in which, besides treating of this particular question, the court, at page 515, gives some of the objects of statutes of this character.

As in the case of the New York statute, the highest court of the state of South Dakota has held that a contract made in interstate commerce by the foreign corporation prior to its complying with the statute, is valid and that the only penalty imposed by the statute in such cases is a suspension of the right to sue on the contract until the statute is complied with. This is held in the case at bar and was also held in the case of *Flint & Walling Manufacturing Company* v. *McDonald*, 21 S. D. 526, 114 N. W. 684. In the latter case, however, the corporation complied with the

statute prior to commencing an action to enforce the mechanics lien filed by it under the contract.

As sustaining the validity of a law of a state which, while it may indirectly affect the transaction of business in interstate commerce, does not directly and substantially burden it, may be cited the case of the *United States Fidelity & Guaranty Company of Baltimore* v. *Commonwealth of Kentucky*, 231 U. S. 394, in which it is held that courts will not interfere with the exercise of the taxing power of a state on the ground that it violates the commerce clause of the constitution, unless it appears that the burden is direct and substantial. In its opinion in that case the court also again distinguishes the *International Text-book Company* v. *Pigg Case*, *supra*.

Practically the latest, at the time of the writing of this brief, published decision of this court in a case in which some of the questions presented to it in the case at bar were considered, is in the case of the *New York Life Insurance Company* v. *Deer Lodge County*, 231, U. S. 495. At page 506 of the opinion, the court quotes from the case of *Hooper* v. *California*, 155 U. S. 648, in which at page 655, the distinction upon which the general rule with regard to interstate commerce and the exceptions from it are based is pointed out, and also cites at page 511 the case of the *County of Moline* v. *Kimbell*, 102 U. S. 691, in which the court, speaking through Mr. Justice Field, says at page 702,

> "Perhaps some of the divergence of views upon this question among former judges may have

> arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

In the light of the last quotation a state court, so far as interstate commerce is concerned, is, we submit, merely a "local aid or instrument," the manner in which it may be used and the conditions upon which it may be used being within the control of the state; and the right to withhold its use, except upon compliance with reasonable conditions, being within the power of the state so long as the constitutional guaranties of due process of law, equal protection of the laws, and equal privileges and immunities are not violated.

In the case of the *New York Life Insurance Company* v. *Deer Lodge County*, *supra*, this court also, at page 511, distinguishes the *International Text-book Company* v. *Pigg case*, *supra*, so greatly relied on by counsel for plaintiff, from that case and in so doing points out the distinction between the *Pigg Case* and the case at bar. The court says "They, the *Lottery Case* and the *Pigg Case*, were concerned with transactions which involved the transportation of property and were not mere personal contracts."

So we say in the case at bar the transportation of

the property had ceased and the title to it had passed, commerce had ended, all that remained was a mere "*personal contract*," to-wit: an obligation to pay for goods which had been purchased, had been received and had become the property of the purchaser. It is immaterial, therefore, whether the goods had been transported or purchased in interstate commerce so long as the state does not declare the obligation to pay for the goods void, or deprive the claimant of the use of its courts to recover a judgment on the obligation, and, as has been shown, the statute does not deprive the claimant of such use. The courts of the state are open to it upon its complying with the reasonable provisions of the statute.

CONSIDERATION OF POINTS IN THE BRIEF FOR PLAINTIFF.

The first point made by counsel for plaintiff is that the state of South Dakota cannot deny the plaintiff in error had the right to sue in its courts because the denial of such a right is an interference with and a burden upon interstate commerce (p. 9 of their brief). We have considered this objection and have answered it at some length above. We note, however, that it is not a fact as stated by counsel that the statute is dependent upon the fact that the corporation must be doing business in the state before it can be denied the privilege of the courts of the state. The statute is so worded, for instance, that it would apply in the case of a corporation suing in the courts of the state of South Dakota on a contract made and to be performed in another state and in which the feature of inter-

state commerce in no way entered. The statute is so written that it applies to (a) the transaction of business, (b) the acquiring, holding and disposing of property, and (c) the suing or maintaining of actions. These are under the statute entirely separate and distinct. They are not made interdependent. Any one or two of them could be eliminated and the statute stand as to the two or one remaining. That is to say, the limitation on the privilege of suit would not have to fall because the statute is invalid as to the transaction of business in interstate commerce, and it will be remembered that the highest court of the state has held that the statute does not apply to the transaction of such business, (the case at bar and *Flint & Walling Manufacturing Company* v. *McDonald*, *supra*), and counsel for plaintiff concede that the bringing of suit by a corporation in a foreign state is not doing business in such state. (Brief for plaintiff in error, page 22.)

The questions of the right of the corporation to make the contract or the character of the contract as to whether or not it was in interstate commerce, are not involved in this case. The South Dakota court has held that the contract was one in interstate commerce and that the plaintiff had a right to make it in the state of South Dakota. These two questions are, therefore, taken out of this case and, therefore, out of the statute so far as its consideration and construction are concerned. Such was not the situation in the *International Text-book Company* v. *Pigg Case*, *supra*. In that case as has been shown, and as this

court in some of the cases in which it has distinguished that case has pointed out, the question was as to the character of the contract. The defendant Pigg insisted that the contract was not one in interstate commerce and was, therefore, unenforcible under the Kansas statute. The court held that the contract was in interstate commerce, but the court did not hold in that case, as suggested by counsel for plainitff in the case at bar, at page 13 of their brief, that as the Kansas law was invalid because it placed an unreasonable burden upon interstate commerce that that part of the law which denied the foreign corporation the right to sue in the courts of the state was also unconstitutional and void. On the contrary, the holding, so far as the latter provision of the law was concerned, was, as has been shown above, not that such provision with reference to the maintaining of an action was unconstitutional and void, but merely that the provision was so inextricably bound up with the provisions of the law held to be invalid and unconstitutional that it had to fall with them and therefore, the entire statute fell. The decision in the *Pigg Case*, therefore, does not support the view taken of it by counsel.

Counsel state at page 14 of their brief that a traveling salesman for a foreign corporation engaged in soliciting orders, is not doing business in the state.

That statement is not sufficiently complete. If to it were added the words "that is subject to the control of the state" it would be a more correct statement. That, however, is something very different from the use of the courts of the state.

A statement made by counsel in their brief at page

16 in discussing this point, however, should be noted. Counsel cite the cases of *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, *Caldwell* v. *North Carolina*, 187 U. S. 622, and *Rearick* v. *State of Pennsylvania*, 203 U. S. 507, as holding that goods sold in interstate commerce are under the protection of the commerce clause of the constitution until they are collected for. Those cases are, so far as the question at bar is concerned, of the class of license occupation tax, original package and drummer cases. They do not support the statement of counsel. Nor can the statement be properly drawn from them. In such of them and other cases of the more or less like character as the feature of the collection for goods sold in interstate commerce at all entered, the orders for the goods were taken and the goods were shipped to the buyer C. O. D. or to the agent to be collected for by him on delivery to the purchaser. In other words, delivery of the goods was not to be made until they were paid for and the seller retained the ownership of and title to the goods until they were paid for. Instead of those cases sustaining the position of counsel as to the extent of the protection of the commerce clause of the constitution, they support the contention we have made in the earlier part of this brief that the protection of that clause over goods sold in interstate commerce extends only to the transfer of the title to and ownership of such goods to the purchaser and that after that stage in the transaction is reached and passed all that the seller has, if the goods have not been paid for, is a claim for their purchase price. The character of such a claim with respect to interstate commerce we have

heretofore fully discussed.

In fact in the *Rearick* v. *Pennsylvania Case, supra*, the court held that goods sent to the customer in fulfillment of orders taken by the agent of a seller in another state are, until actual delivery, within the protection of the commerce clause of the constitution.

The points of counsel that selling goods in bulk, original packages, or articles is protected by the commerce clause of the Federal Constitution (page 19 of their Brief) and that consigning goods to a dealer or representative in another state is not doing business in a foreign state (page 21 of their Brief) in support of which they cite the cases last discussed, are of the same character as their point that a traveling salesman for a foreign corporation engaged in soliciting orders is not doing business in the state and are to be distinguished in like manner from the case at bar. Selling does not, unless expressly made so by the agreement of sale, include collecting.

Under the point discussed by counsel, that the bringing of a suit by a corporation in a foreign state is not doing business in such foreign state (page 22 of their Brief) they discuss at length the case of the *Wilson-Moline Buggy Company* v. *Hawkins, supra*, particularly the decision of the Supreme Court of Kansas in that case, 101 Pac. 1009. We have above distinguished that case from the case at bar.

We suggest, however, that the counsel are in error in stating at page 24 of their brief that the South Dakota court held that it was within the police power of the state to deny a foreign corporation the right to recover by suit for goods sold and delivered. On the

contrary the holding was that the state had the power to require compliance with the statute by the corporation before permitting it to recover by suit for such goods, a very different thing from denying to the corporation the right to recover.

It will be noted that counsel for plaintiff are in error in the statement at page 28 of their brief that the South Dakota statute requires the corporation to "keep a place of business in the state before it can maintain an action in the courts of the state." There is no such provision in the statute.

THE OBJECT OF THE STATUTE.

Among the reasonable objects of a statute of this character are that the state may be assured that foreign corporations shall not carry on any business in the state which domestic corporations could not lawfully conduct; to provide for an effective supervision and control of the business in the state of foreign corporations; to subject foreign corporations to the jurisdiction of the courts of the state, not to the end that the citizens of the state may avoid their contracts and perpetrate injustice, but to the end that justice may be administered to both the corporations and the citizens of the state; that the state before permitting the foreign corporation access to its courts may know that the corporation is organized for a lawful purpose.

A foreign corporation in complying with the statute, does nothing which a domestic corporation does not do, for, of course, the domestic corporation, before its organization is completed must file its articles of incorporation and upon its organization is, of course,

subject to the jurisdiction of the courts of the state, in fact as a rule the expense to the foreign corporation is less than to the domestic corporation. As pointed out above also the foreign corporation can remove itself from the jurisdiction of the state at any time after it has complied with the statute and make such compliance nugatory if it so desires by revoking the appointment of the resident agent for the service of process.

THE STATUTE AND THE POLICE POWER.

We have heretofore not specificially discussed the relation of the South Dakota statute to the police power of the state except as the discussion necessarily involved a consideration of that power. A great deal could be said on this point in showing that the state of South Dakota was well within its police power in enacting the statute and that in exercising that power the state did not encroach upon any of the rights of a foreign corporation given by the constitution of the United States. However, so far as the consideration of this particular feature of the case is concerned, we content ourselves with referring the court to the opinion of Mr. Justice Whiting in the decision of the Supreme Court of the state of South Dakota in the case at bar, 28 S. D. 397, 133 N. W. 683 (Record in the case at bar p. 16) in which this question of the police power is elaborately discussed.

We may suggest in this connection that the second proviso in Section 885 of the South Dakota law making it unlawful for a person to act within the state as an agent or officer of a foreign corporation unless the corporation shall have appointed an agent for the

service of process, etc., is not involved in this case.

This case, as we understand it, does not involve the right of a foreign corporation to maintain an action in the courts of the state with reference to the possession or the ownership or the protection of goods within the borders of the state sold or shipped in interstate commerce, the ownership or the right to the possession or control of which goods is still in the corporation, without the corporation first complying with the provisions of a statute such as that of the state of South Dakota. However, we may say that even before permitting the corporation access to its courts for that purpose, the state would, in our opinion, have the right to exact of the corporation such compliance with the statute.

As was said by his court in the case of *Diamond Glue Company* v. *United States Glue Company, supra*, "Practical lines have to be drawn and distinctions of degree must be made." We submit, therefore, that this case is one in which, after proper distinctions of degree have been made and the practical line has been drawn, it will appear that in enacting the statute in question the state of South Dakota did not, at least so far as the rights of the plaintiff in error in the case at bar are concerned, overstep the line.

Respectfully submitted,

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